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No. 349.

In the Supreme Court of the United States

October Term, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

FRANKLIN JONES, Administrator of the Estate of D. R. Ferguson, Deceased, *Respondent.*

REPLY BRIEF OF PETITIONER.

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STATEMENT OF FACTS.

The railway of the petitioner (herein called the "defendant") runs practically north and south (Rec. 118) through Leesville, Louisiana, a district terminal of the defendant (Rec. 126). D. R. Ferguson (herein called the "deceased") for about ten years prior to his death had been in the service of defendant as a car repairer and car inspector at Leesville (Rec. 73, 96, 97). On February 12,

1922, he was killed while in the service of defendant, presumably by a passenger train of defendant (Rec. 93, 94).

Defendant's main line between Leesville and Staples (Rec. 118), the next station south, is straight for a distance of about a mile and a half (Rec. 79, 90, 129, 131). This main line track adjoins defendant's Leesville yard, the main line being the westernmost track (Rec. 74, 93). The passing track is the next track to the east, and is parallel therewith. The distance between the centers of these tracks is 15 feet, and from rail to rail 10 feet, and between trains on the two tracks about 6 feet (Rec. 119). The other tracks are east of the passing track (Rec. 118).

At the time of decedent's death defendant's employees, including decedent, were making up an interstate freight train on the passing track (Rec. 87, 94), to go north (Rec. 133, 154). They had already placed a caboose and 15 cars on the passing track (Rec. 94). The engine and crew were assembling and weighing cars (Rec. 133, 134), the scale track being about 1,100 feet to the north (Rec. 120). The train was being made up about 1,600 feet south of the Leesville station (Rec. 120). Decedent had finished inspecting and coupling the air on the 15 cars and the caboose (Rec. 94). He was then apparently waiting for the crew to weigh and bring to the passing track other cars which were to be placed in the train (Rec. 95). Deceased was last seen alive about 6:45 P. M. (Rec. 105). He was then standing at the north end of the string of cars on the passing track with his hand on the north end of the last car in the string, and was looking north in the direction where the freight crew were weighing cars (Rec. 104, 107). His inspector's lantern

(Rec. 104) was sitting on the ground by him, facing east, or toward the freight cars (Rec. 107).

A northbound local passenger train of the defendant, due at Leesville at 7:05 P. M., arrived there on time (Rec. 79, 91, 113, 123, 135). Decedent was familiar with the scheduled time of this train (Rec. 79, 96, 117). About fifteen minutes (Rec. 155) after the train came in, the body of the decedent was found near the place where he had last been seen alive (Rec. 161). His lantern was still sitting upright between the main line and passing track (Rec. 102, 161). No one witnessed the accident. Though the engineer and fireman of the passenger train had seen the lantern sitting on the ground between the main line and passing track as they went by (Rec. 124, 132), they did not see the decedent. The engineer and fireman were first advised of the accident by telegraph at a station north of Leesville (Rec. 124, 132). They then examined the engine and found evidence of blood on the east side of the pilot of the engine (Rec. 124, 125, 132).

Defendant's passenger train was equipped with an electric headlight throwing a strong light several hundred feet ahead of the engine (Rec. 128, 177). One of the regulations of the Interstate Commerce Commission was that engine headlights "shall be provided with a device whereby the light from same may be diminished in yards and at stations, or when meeting trains" (Rec. 179). The headlight on this passenger train was equipped with a dimmer by which the engineer could reduce the light (Rec. 123, 177), but the headlight customarily was not dimmed while the engine was pulling a passenger train (Rec. 123, 124, 166, 169, 171, 173), and it was not dimmed on this occasion (Rec. 123, 124). There was no evidence offered that the regulations of the Interstate Commerce Commission required that these headlights be

dimmed in going through railroad yards. Plaintiff's assertion that this train was violating a safety appliance law is not supported by any evidence.

There was evidence that it was defendant's practice for its engineer to sound the whistle and the fireman to ring the bell on this train when coming into the city limits of Leesville (Rec. 79, 126, 132). Defendant's witnesses testified that the passenger train came in on time and at its usual speed (Rec. 123, 133, 135); that the whistle was blown for a crossing south of the place of the accident (Rec. 123, 129, 132, 160); that it whistled for the station announcing the train's approach to Leesville (Rec. 123, 129, 132, 135, 150, 160); and that the engine bell was ringing in going through the yards (Rec. 123, 129, 132, 149, 152, 154).

Decedent's children, and the husband of one of them, testified that defendant's passenger train was running faster than usual as it passed the place of the accident (Rec. 76, 81, 104, 108, 112); that no whistle was blown (Rec. 76, 81, 88, 99) as the train approached the place of the accident. Three other witnesses gave similar testimony (Rec. 104, 108, 112), two of these other witnesses, however, being directly contradicted by statements signed by them the day following the accident (Rec. 163, 164). These same witnesses also testified that the engine bell was not rung (Rec. 76, 81, 88, 99, 104, 108, 112). Plaintiff's witnesses admitted, however, that the noise of the train was plainly audible as it approached (Rec. 78, 83, 96, 100, 109, 114), decedent's eldest daughter testifying that while the train did not whistle at Staples (a mile and a half below Leesville), she heard it start out of Staples, and she could hear it all of the way to Leesville (Rec. 115). She, her husband, and another child of decedent who testified as to the signals and hearing the

noise of the train, were then at the home of decedent, which was about a block (Rec. 75, 93, 118) from the place where the accident occurred (Rec. 75, 100).

The evidence showed that customarily car inspectors worked on the side away from the main line in doing their inspecting (Rec. 156); that it was not convenient for them to work on the west side of the train while the train crew was at work putting cars into the train, although, when the crew was away, a man could work on the west side if he so desired (Rec. 159). There was also testimony that after the train was finally made up the inspector usually went up one side of the completed train and down the other for a general inspection and to test the air (Rec. 94).

There was no evidence that the decedent was engaged in any work at the time of, or immediately prior to, the accident, or that his mind was engrossed in his work, or that the whistle and bell signals were sounded for his particular benefit or for the benefit of car inspectors, the evidence being that they were sounded merely as a general warning to persons of the approach of the train (Rec. 127, 130, 132).

ARGUMENT.

I.

The theory upon which plaintiff seeks to support the verdict of the jury in this case is that the defendant desired to secure from its car inspectors a maximum amount of efficiency, and for that reason it induced them to rely upon the sharp sound of the bell for warning of the approach of trains, thereby implying that such car inspectors could disregard all other warnings or notices of the approach of trains; that they could go upon main line tracks at the time when passenger trains were due thereon without looking or listening for such trains, although such trains might be plainly visible and clearly audible.

It is needless to say that this theory is not supported by any evidence in the record, or by any inference to be based on any such evidence; that it is inconsistent with common sense, common prudence, and the law as frequently declared by this Court.

Plaintiff's theory of the law is directly contrary to the decision of this Court in *Baltimore & Ohio Railway Co.* v. *Goodman*, 48 S. C. R. 24, decided by this Court October 31, 1927. In that case, as in this, it was contended that adequate signals of the train's approach to a highway crossing were not given. This Court said, however, "It seems to us that if he relies upon not hearing the train or any signal, and takes no further precaution, he does so at his own risk." A judgment in favor of the defendant was reversed.

In *Toledo, St. Louis & Western Railroad Co.* v. *Allen*, decided by this Court February 20, 1928, plaintiff, a car

checker, was struck and injured by a shunted car while working in the railway company's yards at Madison, Illinois. He contended that the defendant was negligent in requiring him to work between tracks where there was an insufficient clearance, and in permitting the cars to be run down upon him without warning. The court held that he could not recover.

In *Missouri Pacific* v. *Aeby*, 48 S. C. R. 177, a station agent was injured as a result of a defect upon a station platform with which she was familiar. It was held that she could not recover even though the defendant may have been guilty of negligence.

II.

Even if the law would justify decedent in stepping or being in front of an approaching train which was plainly visible and clearly audible, because he was engrossed in his work, the evidence does not show that he was so engrossed.

The evidence showed that the customary method of making up a train is to place a caboose on the make-up track, and to build the train against that caboose. As the train is building, the car inspector begins with the first cars and inspects those cars and couples their air-hose. As the work on those cars is finished he goes on to the next cars placed in the train. As he finishes the cars then on the track he stands around and waits for more cars (Rec. 95). The car inspector who finished the inspection of the train after the death of decedent, testified that when he arrived the 15 cars that were on the track at the time decedent was killed had been inspected and coupled. There was no evidence that decedent was

doing any work about the cars at the time the passenger train came in, and therefore, no evidence of his being engrossed in any work even if it were true that his being so engrossed would excuse his failure to look out for trains and cars in going upon a railroad main-line at the time when a passenger train is due thereon, and plainly audible and visible.

We have shown in our former briefs that the jury found that the decedent was blinded or confused by the headlight of the passenger train. If that were true he must have known of its approach, and therefore the silence of the engine bell, if it were silent, was not a proximate cause of his death.

Plaintiff attempts to meet this situation by contending that the decedent came upon the track immediately in front of the train, and that therefore the headlight and the alleged silent bell might both be proximate causes of his death. It is true the fireman and engineer said they did not see the decedent, and it may be true that the decedent did come upon the track under the rays of the headlight and thus not be seen by the fireman and the engineer. In that event he would not have been blinded by the headlight. The decedent may have been sitting or squatting too near the track, possibly in the shadow of the reflector of his inspector's lantern sitting between the tracks, and this might have prevented the engine crew of the passenger train from seeing him. In the absence of any evidence on this subject it is a matter of pure surmise as to what he did and where he went upon the track, and where the train was at that time, just as it is a surmise that he was engrossed in his work at the time of the accident, and that he relied upon the ringing of the

engine bell on the passenger train to apprise himself of its approach, while relying on his own vigilance to protect himself from the movements of the engine and cars on the make-up track. See *Gulf, Mobile & Northern Railway Co.* v. *Wells*, 48 S. C. R. 151, decided by this Court January 3, 1928; see also *Oglesby* v. *Missouri Pacific Railway Co.*, 177 Mo. 272, 295, 296.

III.

The silence of the engine bell, if it were silent, was not a proximate cause of plaintiff's death.

It was shown by plaintiff's own evidence that the passenger train in question was producing a roar and noise as it came to the place of the accident. Plaintiff's daughter testified that she heard this train leaving Staples, a mile and a half away. There is no reasonable explanation of decedent's failure to hear and keep out of the way of this train. We have shown that plaintiff attempts to explain decedent's conduct by contending that decedent relied on an implied contract of the defendant to warn him of the approach of the train by ringing the bell, and that, even though the train was making a noise, he did not hear it because he was engrossed in his work. But the evidence did not show that he was so engrossed.

Plaintiff also contends that while the decedent may have heard the train, which was clearly audible, he may have mistaken the noise of the approaching train for the noise of the engine that was making up the freight train, and that in stepping from between the cars where he was working he hurriedly got away from them and looked

to the north to ascertain whether the light and noise were in fact from the engine of the freight train. This contention, also, is not founded on the evidence or on any reason. The roar of an approaching passenger train in no wise resembles the noise of an engine slowly pushing freight cars. Furthermore, this theory is irreconcilable with the theory that the decedent was blinded by the headlight of the approaching train, for the headlight was approaching from the south, and if he were looking to the north he could not be blinded by it. Plaintiff's inconsistent contentions are a clear demonstration of the fact that a finding by the jury that the decedent was in the exercise of due care at the time he was struck by defendant's passenger train must be based on surmise and conjecture. On one theory, the plaintiff did not hear the approaching passenger train, and was blinded by looking toward its headlight; on the other, he heard the noise of the train and came in its path while looking away from it.

As was said by the Supreme Court of Missouri in *Oglesby* v. *Missouri Pacific Ry. Co.*, 177 Mo. 272, 295, 296, where one piece of circumstantial evidence tends to prove one fact and another piece of circumstantial evidence tends to prove the contrary, a finding based thereon is purely conjectural.

On page 49 of plaintiff's brief is the following frank statement: "Where circumstances must be relied upon to ascertain the precise cause of death, an inference must be drawn. We frankly state that we believe the jury would have been justified in finding against respondent in this case."

This is a confession that the circumstances point as strongly to non-liability as to liability. And yet plaintiff contends that a verdict based upon such circumstances is

not a purely conjectural verdict, and ought to be sustained.

Respectfully submitted,

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OCTOBER TERM, 1927.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED,
RESPONDENT.

REPLY BRIEF TO PETITION FOR CERTIORARI.

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The petitioner contends that Ferguson was guilty of negligence which contributing with its negligence caused his death; or that Ferguson was guilty of negligence which was the sole cause of his death; or that Ferguson met his death by reason of risks assumed by him. However, in conceding that the Supreme Court of Texas correctly held its negligence in failing to ring the bell proximately caused Ferguson's death, it eliminates the question of Ferguson being guilty of negligence which was the sole cause of his death.

These propositions are presented in the petition for *certiorari* in such way that is confidently believed they may be collectively answered in one general statement and remarks under same; we therefore present a brief reply to same, and will then take up the propositions of the petitioner and answer them more fully and somewhat in detail.

Petitioner has found no fault with the decision of the Supreme Court of Texas, holding that it was guilty of negligence proximately causing Ferguson's death in failing on the occasion in question to follow its self-imposed custom of ringing the bell to warn Ferguson and those similarly situated of the approach of the train.

The question of contributory negligence, if any there was in the case, and the question of assumed risk, if any present, were issues of fact; and each was resolved against the petitioner by the jury.

The petitioner was making up a northbound freight train in its yard at Leesville, Louisiana, on a track alongside the main line. When both of these tracks were occupied by cars, there was a free space of only four or five feet (R. 95). It is perfectly apparent that in stepping from an inspected car, the inspector would frequently, if not usually, get near enough to the main line to be struck by a passing train—a mere step, as there was barely room for one to stand in the clear; hence, the wisdom of the custom of ringing the bell to warn him—and of not violating it.

The work was being done in the usual way, by first placing the caboose of the train near the south

end of the side track, and then from time to time pushing and shunting cars in onto the caboose from the north end of the track. The deceased was a car inspector, apparently the only one on duty at the time, and it was his duty to inspect the cars as the train was built up so as to have the inspection practically completed by the time the last cars should be placed in the train, thereby avoiding delay.

There is a strong inference, if not a legal presumption, that deceased was not guilty of negligence, but on the contrary carefully responded to the natural desire to live.

In the discharge of his duties it was necessary for the deceased to go between the cars of this freight train (at each opening) that was in the making (R. 94), see that they were coupled, connect the air hose, and inspect the safety appliances; in short to make a detailed inspection, and when more cars were shunted or pushed in on those already on the track, the same work was continued with reference thereto. Cars were being continuously sent in to become a part of this freight train.

When Ferguson was killed, he had made inspection of about 15 cars on the south end of the freight train. The car inspector who took charge after his death said (R. 94) "All of those cars had the air hose connected up, but the air hose on the cars north of his body had not been coupled up."

The deceased was seen by L. E. Crawford, one of the employees of the petitioner, about twenty minutes before he was killed, at which time he was en-

gaged in inspecting the cars of the freight train referred to (R. 145). He was seen just a few minutes before he was killed by the witness, H. Thorla, probably the last person who saw him alive (R. 112), and was then apparently engaged in inspecting cars of this freight train that was being built up on the side track adjacent to the main line. The work of inspection is described in much detail by the witness, Nick Franklin (R. 94 and 95), but concretely stated, consists of the inspector looking over the side and grab irons, then passing between it and the next car to see that the couplers are properly connected; couple the air hose; inspect the safety appliances; then step out from this place, and proceed to the end of the next car inspecting as he goes and then repeat the same duties between the cars, and when necessary, to make light repairs of the safety appliances.

In doing this work in the customary way, and in stepping back from the opening between the cars, the inspector would step several feet away from the cars he was inspecting, bringing him close to the main line track.

The engineer (R. 124) and fireman (R. 132) on the north bound passenger train which struck and killed Ferguson somewhere around 7:05 p. m. (and possibly less than four minutes after Tholar had seen him), testified that as they passed through the yard, they kept a lookout and saw Ferguson's lighted lantern sitting between the main line track, and the string of freight cars of the train that was being made up, and

that Ferguson was not on the main line, or between those tracks as the train approached.

The proof shows that objects immediately in front of the locomotive are not visible by those operating the engine, but that at a distance of some seventy feet or more from the front end of the locomotive, objects on and near the track are plainly visible. It was conceded in the trial, in fact the case was tried on the theory that Ferguson was in an erect position when he was struck by the pilot beam and killed. The location of the wounds to Ferguson's torso (R. 122) showed that at the instant he was struck by the pilot beam he must have been facing southeast diagonally away from the approaching train with the right side of his back in position to be first struck (R. 122). Thus it would appear that Ferguson stepped from between the cars where he was working, after the engineer and fireman had ceased to observe the track in front of them, and that being misled as to the distance of the approaching train, by reason of the custom of ringing the bell not having been followed, and probably confused by the bright headlight, he accidentally came in the path of danger and was struck by the pilot beam and killed.

The question of whether Ferguson was guilty of contributory negligence, certainly could not be resolved against him as a matter of law, but if raised by the evidence, was an issue of fact for the determination of the jury, and if so, this court will not be concerned with the disposition of that issue of fact by the jury, and approved by the Supreme Court of the State of Texas; therefore, the theory that Fer-

guson was guilty of contributory negligence as a matter of law, insisted upon by the petitioner, is without merit.

Considering the other contention of petitioner, namely: That Ferguson met his death as the result of a risk assumed by him, we really fail to appreciate the force of petitioner's contention. It has been determined by the jury, and by the Supreme Court of the State of Texas, that Ferguson met his death as the result of negligence—in that petitioner failed to comply with the custom which it had voluntarily established of ringing the bell as that particular passenger train passed through the yard at Leesville, as a means of safety to the car inspectors, by bringing sharply to their attention, that the approaching train was dangerously near; and it does not in this court complain of the correctness of such conclusion. There is no contention that this custom had ever been breached before the time Ferguson was killed, and certainly Ferguson did not assume the risk of dangers presented through the negligence of his master—not having any notice of even a remote probability of such negligence.

When one considers the manner in which Ferguson's duties were discharged, and the necessity of prompt performance in getting out the freight trains of the master, the necessity for establishing the custom of through trains ringing the bell as they passed along where his work was to be done, becomes manifest, but we are not dependent upon the wisdom of this requirement being visited upon the master, for it ap-

pears without controversy, that the petitioner had voluntarily established that custom as a means of protection to men engaged in the very work in which Ferguson was engaged (R. 130 bottom of page). Certainly the petitioner could not establish a custom or usage for the benefit of Ferguson, and then contend that Ferguson assumed the risk of it not discharging the voluntary burden it had assumed. In other words, it cannot be reasonably contended that Ferguson should have anticipated that the master would be negligent in the very particular of violating a custom which it had established for the protection of the very person who was injured by the negligent breach of that custom.

Ferguson did not assume the risk of injuries due to the master's negligence, unless he knew of the negligence and appreciated the danger to himself therefrom in time to in the exercise of ordinary care, have avoided injury. This doctrine is axiomatic and is fully discussed in *Gilla Valley Railway Company* v. *Hall*, 232 U. S. page 94.

There being no contention that Ferguson knew, or had any reason to anticipate negligence such as resulted in his death, the doctrine of assumed risk was not a question at issue in the case, but certainly if it could possibly be contended that it was raised by the evidence, it was an issue of fact which the jury has in its prerogative resolved against the master, and its decision is final.

Inasmuch as it was conceded by both the plaintiff in error and defendant in error on the trial of

this case, that Ferguson was not on the main line, or between the train that was being made up on the side track and the main line, until the train that killed him reached a point near where his lantern had been left between the main line and the train that was being made up, and that Ferguson thereafter came in such close proximity to the main line as to be struck by the pilot beam and killed, the jury had the right to conclude (as it did), and find from the evidence that Ferguson was busily engaged in some work between two of the cars of the train that was being made up, such as coupling the air hose, or doing some other work necessary, and that he finished the work, and stepped from between the cars and far enough away from them to be struck by the pilot beam. No rule or custom prescribed the distance Ferguson might step from the freight cars. Then viewing these facts in connection with the fact that the plaintiff in error established the custom of causing the bell to be rung as the passenger train passed through the yards for the purpose of warning car inspectors of the approach of the train (as testified to by the conductor of the passenger train, R. 130), and the dangerous proximity thereof, and that the Supreme Court of Texas has accepted the jury finding that a failure to ring the bell on the occasion in question, was negligence which proximately caused the death of Ferguson, and that there is no complaint in this court of the correctness of that conclusion so reached by the Supreme Court of Texas; we must view the finding of the jury that Ferguson was free of contributory negligence in light

of all of these circumstances. That is to say in balancing the evidence on the issue of Ferguson's contributory negligence, the jury had the right, and in fact it was its duty, to take into consideration the character of work in which Ferguson was engaged, including the common knowledge as well as the testimony to that effect, that Ferguson was to do the work of inspecting and connecting up the freight train somewhat hurriedly so as to avoid delaying that train; and the fact that Ferguson knew that the plaintiff in error had voluntarily established the custom of ringing the bell on the train as it passed through the yard, so as to give him timely warning of its dangerous proximity; and the probability of Ferguson becoming confused when he stepped from between the cars by reason of the bright light and made an effort to protect himself by turning from it to get his bearings, but which brought him in the path of the pilot beam; and if from all of these facts and circumstances, reasonable minds might differ as to whether Ferguson was guilty of contributory negligence in getting near enough the main line to be struck, then the finding of the jury in his favor on that issue is conclusive.

It occurs to us that it is very clear that the evidence raised an issue of fact as to whether Ferguson was guilty of contributory negligence, for even if he had known of the approach of the train, in view of the fact that the railway company had established the precedent of ringing the bell to warn him of its dangerous proximity when it should reach such a place as to make it dangerous to him, the jury had the right to

conclude that Ferguson was not guilty of contributory negligence in failing to anticipate that the self-imposed custom would be on this occasion needlessly violated.

AUTHORITIES.

Evidence sufficient to show Ferguson's mind concentrated in his work.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Choctaw Oklahoma & Gulf Ry. Co. v. *McDade*, 191 U. S. 64.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.

Contributory negligence an issue of fact.

Railway Company v. *Stout*, 17 Wallace 657.
Richmond & Danville R. R. Co. v. *Powers*, 149 U. S. 43.
Kreigh v. *Westing House, Church, Kerr & Co.*, 214 U. S. 249.
McDermott v. *Severe*, 202 U. S. 600.
Shearman & Redfield—Negligence, 6th Ed. Sec. 114 (Note).

No assumed risk.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

The Court of Civil Appeals of Texas contended that Ferguson was sitting or squatting on or near the main line track, and negligently remained there until struck by the step of the pilot. The petitioner repudiated that theory (R. 222)—in fact, the case was tried by both parties on the assumption that Ferguson came in the path of the pilot beam in an erect position. The

Supreme Court of Texas reversing the Court of Civil Appeals, held that the jury had the right under the evidence to conclude that Ferguson was not guilty of negligence.

This case should not be confused with those cases in which it has been held that men who work on the track must protect themselves against the movement of trains which they know will be moved over the track without warning, such as:

> *Aerkfetz* v. *Humphreys*, 145 U. S. 418.
> *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218.

It is a matter of the commonest knowledge that the very nature of the employment of a car inspector requires the concentration of his mind upon the work in which he is engaged, for upon its faithful performance, the safety of the train—the lives of employees and passengers—depend. This prompted petitioner to adopt the plan of ringing the bell, to notify Ferguson of the dangerous proximity of the train. The right of Ferguson to rely upon that warning, together with the character of his work, etc., must be taken into consideration in passing upon the question of contributory negligence.

PROPOSITIONS OF PETITIONER.

The respondent will now present an answer to the propositions of petitioner in the order in which said propositions are presented in its brief.

I.

In its first proposition the petitioner contends that Ferguson was guilty of negligence which as a matter of law contributed to his death.

Inasmuch as the burden of establishing contributory negligence was upon the petitioner, and it was submitted to the jury (R. 16) and found against it (R. 37) this court will not be interested in considering the question further than to ascertain that the evidence was not so conclusive of contributory negligence as that reasonable minds might differ as to whether it existed. That is to say when it shall be made to appear to this court that there was substantial evidence raising an issue as to whether Ferguson was guilty of contributory negligence, this court will accept the finding of the jury on that issue.

The petitioner used the sidetrack next to the main line for making up north bound freight trains; there was testimony that there would be a clear space of only four or five feet between cars on that track and a passing train (testimony of Nick Franklin, R. 95). The car inspectors might inspect from either side of the cars; the petitioner has established the custom of requiring the engine bell to be rung on north bound

trains passing over that part of the main line to sharply notify car inspectors when such trains reached a place where they would endanger their safety. Conductor Proud said (R. 130, near bottom of page):

> "The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yard that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself, and is a warning of the presence of the train."

The petitioner had established the common sense practice or custom of having the car inspector inspect its freight trains as they were being made up, beginning with the first cars shunted in to the caboose, and if practical have the work of inspecting the train finished by the time the last car was placed in same. After detailing how an inspector would inspect those cars, Nick Franklin testified R. 94:

> "He did it in the most expeditious way owing to the speed the cars were being put in."

Nick Franklin, a car inspector of long experience in describing the manner of making inspection of freight cars while a train was being made up on the track next to the main line (R. 116) testified that the inspector would set his lantern down and go between the cars and connect up the air hose, and says (R. 116):

> "A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, get back in the

clear several feet, that is, the practice and habit of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed, that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when cars were on both tracks, there wasn't but three or four feet between the cars, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

T. H. Burke, the conductor on the freight train that was being made up after stating that his engine had placed some cars in on the passing track where the train was being made up, testified with reference to the time these cars were placed on the passing track before the passenger train came in as follows (R. 135):

> "The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night—we must have left down there to go away I suppose about 6:40."

The witness, A. H. Thorla (R. 111) passed those cars placed in on the side track a very short time before the passenger train came in, and as he passed he saw Ferguson with his lantern moving along side the cars as if inspecting the same.

The engineer on the passenger train (R. 124) and the fireman (R. 132) each testified that as they passed through the yard they kept a lookout and saw a lighted lantern between the main line track and the cars on the side track, but that no person was between the tracks or on the main line.

No one saw Ferguson when struck by the pilot beam, and no one saw his movements immediately before he was struck. The petitioner accepts the silent, but impressive blood stains on the pilot beam as conclusive that it caused his death. The question of whether his conduct was such as to constitute contributory negligence must be determined by the circumstantial evidence which the parties have been able to produce.

There is no necessity of resorting to conjecture; for inasmuch as it was Ferguson's duty to inspect the cars of this freight train as they were being placed on the track next to the main line; (R. 116) and inasmuch as he was killed in approximately twenty-five minutes after the time Conductor Burke says they placed a string of cars on that track (for him to inspect) and left it to go to the scale track; (R. 135) and inasmuch as he was seen by Thorla passing along this string of cars within three or four minutes of the time he was killed; (R. 111) and inasmuch as the inspector who took up the work after he was killed, found that some fifteen cars had already been inspected, and the air hose connected up; (R. 94) and inasmuch as the engineer (R. 124) and fireman (R. 132) as their train approached where he was killed, saw his lantern on the ground between the tracks; and inasmuch as it was the custom for car inspectors to place their lantern on the ground or end of the ties when they went between the cars to connect the air hose; (R. 115) and inasmuch as Ferguson must have been between the cars as the engineer and the fireman approached his lantern; the jury had the right to conclude that Ferguson did not carelessly step

from between the cars and into the line of danger, with knowledge or charged with knowledge that the train was then rapidly approaching; but rather, that being engrossed in his work and having become accustomed to take heed of the warning that the sharp sound of the ringing bell would give him, he was misled into believing that no train was within dangerous proximity to him, and probably was blinded by the glaring headlight, all of which confused him, and in his efforts to get to a place of safety, or to turn from the light so as to get his bearings, he inadvertently stepped into the path of danger, and received his injuries.

In passing upon the question of the presence or absence of contributory negligence on the part of Ferguson, we must remember that the burden was upon the petitioner to establish contributory negligence, and it has offered no testimony raising that issue, other than the fact that he was killed by a train that was being negligently operated. In this connection, it is not amiss to consider that for many years Ferguson had faithfully discharged his duties without being injured. That he was a competent and careful man is emphasized by the testimony of the man who had been his boss for more than two years, who says (R. 157-158):

> "Mr. Ferguson was a car inspector under me about two years and six or eight months; he was never laid off during that time, and there was never a black mark against his work during that time; I never so much as had a criticism against his work that I can recall" (S. F. 136).

The petitioner seems to misunderstand the scope and effect of the case of *Aerkfetz* v. *Humphreys*, 145 U. S.

418, and other similar cases, which are not at all applicable to the facts of this case. The Supreme Court in the Aerkfetz case merely held that one working on a track over which cars were being constantly shunted in a switch yard, took the situation as he found it, and as there was no custom of notifying him of the approach of cars, negligence could not be predicated on a failure to do so. Likewise, having full knowledge of the fact that cars were constantly shunted over these switch tracks without notice being given to men working on the tracks, he assumed the risk of being injured by such movement.

This case is in line with the case of *McGovern* v. *P. & R. R. Co.*, 235 U. S. 389—and the case of *Sea Board Air Line Ry. Co.* v. *Konnecke*, 239 U. S. 353—in that the deceased had the right to act upon the assumption that the petitioner would comply with its self imposed custom of ringing the bell to warn him of the dangerous proximity of the train. One may assume that while the car inspector was engrossed in his work, if he in fact heard the rumbling, the ordinary noises of the approaching train, he concluded that the same came from the movement of the engine that was making up the freight train, and certainly that he may have concluded that there was no train in dangerous proximity to him. In fact, we may go a step further and without resorting to conjecture easily reach the conclusion that he mistook the noises of the approaching train for noises of the engine that was making up the freight train, and that in stepping from between the cars where he was working, he hurriedly got away from them and looked

to the north to ascertain whether the light and the noise were in fact from the engine of the freight train.

The petitioner says:

> "The giving of warning signals is merely an additional precaution to warn parties of the approach of trains lest they fail in their duty to use proper diligence. In other words, it is a double precaution to assist the non-vigilant in case they are lax in their duty to protect themselves."

One having the smallest modicum of knowledge of the operation of railroads and trains, readily appreciates the fallacy of that statement. Such customs are established so as to increase the output and efficiency of the workmen. The car inspectors and other workmen would be forced to measurably neglect, or at least delay the performance of their duties if they were required to assume the burden of discovering the approach of trains which suddenly came into the yard without warning. The petitioner saw fit to place upon the operatives of the locomotive the small burden of ringing the bell, thereby relieving the inspector of trying to carry the burden of anticipating and providing against danger from passing trains, as well as the burden of charging his mind with the discharge of the duties connected with his job.

There has never been a rule of law—there probably never will be, to the effect that a person engrossed in his work which encompassed and embraced the necessity for looking out for cars that might be shunted in on others while he was between them making inspections, must neglect his work, and listen for a train, the ap-

proach of which he had the right to assume would be heralded by the ringing of a bell.

One is held guilty of contributory negligence where he relies on another not being negligent only in those cases where the injured party is shown to have had full opportunity to have discovered the danger and negligently failed to exercise care for his own safety; where without having anything to divert his mind to other matters, he carelessly gets in the path of pending danger; such as where a pedestrian heedlessly steps upon a railway track immediately in front of an approaching train. But where the testimony and inferences to be drawn therefrom; and the presumption that one killed has exercised proper care, raise the issue of the mind being drawn away from impending danger, the question of contributory negligence is for the jury.

There is nothing in this case to indicate that Ferguson did not have the right to get near or even upon the main line.

It is said Ferguson knew the time the passenger train would reach Leesville. But he certainly was not required to work with his watch in his hand—in fact it would have been impossible for him to do so; and why adopt the custom of ringing the bell instead of depending upon the ordinary noise of the approaching train, if men engrossed in their work could not rely upon it as a warning.

It is argued by petitioner that the train was visible and made much noise, and that deceased should have known of its approach; but such argument ignores the fact that petitioner was violating its custom of ringing

the bell, and that the evidence justified the jury in finding that Ferguson was engrossed in his work, and in watching the movements of the switching train. It is believed that it has been quite universally held that where one is engaged in work, or has his attention in any way diverted from the danger, that he is not guilty of contributory negligence in failing to anticipate negligence of the wrong doer. Certainly if it be viewed as an original proposition, it must impress one that such rule should prevail, for it would be impossible for the traffic of the world to be moved for a day, or for one to go to or return from his office without assuming that others would not be guilty of negligence in their movements.

It is believed that it is quite universally established that negligence and contributory negligence are issues of fact for the determination of a jury, except in cases involving statutory regulations, and those cases in which the minds of reasonable men can not differ as to the conclusions that should be reached. The question of what should and what should not be submitted to the jury naturally brings us to the case of *Railway Company* v. *Stout*, 17 Wallace, 657.

This case has so long been recognized as the leading authority upon this question, and has been quoted so often that practically every lawyer in the land knows by heart the principles therein laid down. We quote, not to apprise this court of anything which may be termed elementary authority, but because we deem it as applicable to this case, and because it expresses the princi-

ples involved herein as well as they have been expressed, or ever can be expressed.

> **"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of the jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus concurring than can a single judge."**

We herein offer and commend to the court's attention some of the cases which recognize and follow the rule. We trust that, in thus presenting such a voluminous list of authorities, we are not unduly trespassing upon the court's time; but we feel that, though the question as to what should and what should not be left to the jury has been settled countless times, nevertheless it is incumbent upon us to produce authorities sustaining our viewpoint, and to present them, to the best of our ability, in such manner as least to inconvenience this court in reviewing them.

In the case of *Richmond & Danville Railroad Co.* v. *Powers*, 149 U. S. 43, the United States Supreme Court, speaking through Mr. Justice Brewer, says:

> "The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased was guilty of such contributory negligence as to prevent a recovery. **It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.**"

This case has been quoted many times, always with approval. We name one case, *McDermott* v. *Severe*, 202 U. S. 600, 50 L. Ed., 1162, in which the court says:

> "Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. **If fair-minded men, from the facts admitted, or conflicting testimony may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, and to be settled by the jury under proper instructions.**"

It is not essential to sustain a recovery in cases like this that there should be direct evidence by the mouth of eye witnesses to the occurrence. The manner in which the accident happened, as well as the absence of contributory negligence may be established by circumstances.

In *New York Central Ry. Co.* v. *Gapinski*, 161 C. C. A. 354, the plaintiff, Gapinski, was injured while bend-

ing over stuffing grease into the journal boxes of freight cars. His injury was claimed to be due to the fact that he was struck by some projecting object upon a car which was "sent down upon the track on which or alongside of which he was working."

Gapinski testified that he did not know what hit him because when struck he was stooping or leaning over and working. "There was direct evidence that many of the cars" which were "sent down on said track were 'crippled,' i. e. cars 'with doors hanging out.' "

The testimony as to the crippled cars was denied, and the issue being submitted, Gapinski had a verdict.

The opinion of the court is as follows:

> "It is, we think, sufficient to dispose of this writ to refer to *Smith* v. *Pennsylvania R. R. Co.*, 239 Fed. 103, 151 C. C. A. 277. We there pointed out that, where there was no proof that any definitely indicated thing wrought the injury complained of nor 'that the circumstances rendering it possible for the injuring thing suggested **by plaintiff** to reach or touch, **plaintiff** existed at the time and place of damage, any verdict resting on such evidence, or lack of it, would be building one presumption upon another.
>
> "In that case, the suggested instrument of injury was the swinging rake hook of a passing locomotive. In this case, the suggested cause of plaintiff's hurt was a door hanging or projecting below the car body to which it belonged. But in the Smith case, **there was no evidence whatever** that any rake hook was projecting at the time when and place where plaintiff was injured. In this case, there is direct evidence that not one, but several, if not many, cars having such unusual and dangerous projections were moving upon the

track along side of which plaintiff here was required to work.

> "**If the jury believe (as it did) this positive testimony of moving crippled cars, it was within their province to draw the inference that such proven projection did the hurt.** In the Smith case, there was no proven projection. We think the case cited and the present one **considered together** perfectly illustrate the difference between a legitimate presumption from proven facts, and an attempted and unlawful presumption from another presumption."

In the case of *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. Ed. 984, the supreme court said, speaking through Mr. Justice Day (page 258):

> "Questions of negligence do not become questions of law, to be decided by the court, except '**where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.**' *Gardner* v. *Michigan Central R. Co.*, 150 U. S. 349, 361; 37 L. Ed. 1107, 1110."

We next offer the case of *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 192, 193, 194; 58 L. Ed. 906, 911. In that case, Myers was a brakeman on an underground mining train and had ridden a string of cars in on a switch. The electric motor car followed these cars in on this switch, where it ran upon something and was stopped. It was then discovered that Myers had been run over.

Near the point where Myer's body was found, the overhead trolley wire, which supplied the current to the electric motor car, passed over the tracks at a height of five feet seven and one-half inches from the rail, making it necessary for a man of ordinary height to remain seated in the car or stoop down. There was no light near this place.

The headlight on the motor car was defective and was not burning.

The case was submitted to a jury and a verdict was had by Myers' widow.

The verdict was reversed by the circuit court of appeals.

The supreme court reversing this holding after stating the facts, said, in part:

> "The opinion of the Circuit Court of Appeals placed the reversal largely upon **the want of definite proof as the manner in which Myers came to his death—whether by contact with the wire, or if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and in the absence of some accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death.** * * *

"Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation, he was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon the testimony which, when fairly considered, might sustain the verdict."

In the case of *Railway Company* v. *Howard*, 79 Ga. 44, the court said:

"The question of what is ordinary care and what is negligence is exclusively for the jury, and the court in this charge takes this question from their consideration. * * * The court cannot instruct the jury what a prudent man would do; for in legal contemplation, the jury knew it better than the court. If instructions on that subject had to be given, the jury would be the instructors and the court the instructed; that is, the jury would charge the judge on that part of the case, rather than receive a charge from him. It is not for the court to teach the jury the ways of the prudent man, but to warn them of the duty on the part of all others to make their ways like his.

The court cannot point out to the jury specifically the ways of the prudent, the law supposing those ways better known to the jury than to the judge."

II.

The petitioner presents for its second proposition the contention that Ferguson was guilty of negligence which was the sole cause of his death.

A detailed answer to this proposition would consist largely in a re-hash of what has been said in answer to petitioner's first proposition. Under this proposition the petitioner presents argument that inasmuch as the jury found that Ferguson was blinded by the glaring head light, that it contradicts the finding that the negligence in failing to ring the bell was the proximate cause of Ferguson's death. This argument ignores the well established doctrine that there may be more than one proximate cause of an injury, especially where those causes are not inconsistent.

We emphasize the statement that there is no inconsistency in the finding, by calling attention to the fact that the evidence was sufficient to have justified the jury in finding that Ferguson had been engrossed in his work between two cars, and not being advised of the approach of the train by the customary sharp ringing of the bell, stepped away from the standing cars, and met the glare of the headlight, which blinded him, and caused him to become confused, thereby causing him to stumble into a position of danger, or prevented him from appreciating the distance he was from the track, and the distance the approaching train

was from him—in other words, that the failure to ring the bell, and the glare of the headlight operated as two proximate causes of him being injured.

In this connection we call attention to the fact that the locomotive was being operated in violation of the National Safety Appliance Laws, and the applicable rules of the Interstate Commerce Commission, in that the headlight on the locomotive that struck Ferguson was not "diminished in the yard and at the station." The applicable rules of the Interstate Commerce Commission after requiring the use of certain designated headlights on road engines, provides in Section (C):

> "Such headlights shall be provided with a device whereby the lights from same may be diminished in yards and at stations, or when meeting trains" (R. 179).

Section 131 of the said rules of the Interstate Commerce Commission provides the character of lights that shall be used on engines engaged in switching service in the yards (R. 179).

The engineer testified (R. 123) that he had a bright headlight which was provided with a dimmer, but says:

> "I did not cut out my light or dim it in any way in going through the yards, I had a bright burning light."

The testimony was conclusive that the light was not dimmed.

It was shown (R. 85) that with a bright headlight such as described, that when the engine got within 200 feet of a person, if he looked toward it, it would blind him so that he would not know or could not see what he was doing. That it would prevent him from telling how far the train was from him.

> "If it was burning full bright, it blinds them, he just can't see."

There was quite a bit of uncontroverted testimony on this point conclusively establishing the well known fact that an undimmed headlight when it gets reasonably near to one, has the effect of suddenly causing temporary blindness, and producing a state of confusion. This is common knowledge.

We submit that inasmuch as the petitioner was confessedly violating the Safety Appliance Laws, and that there was sufficient evidence to sustain the jury finding, that such operated as a proximate cause of Ferguson's death, that in any event, the judgment of the trial court should be sustained, because contributory negligence, if any, does not apply where the injury is caused in whole or in part by the violation of the safety appliance laws, or the applicable rules of the Interstate Commerce Commission thereby authorized (*Union Pac. Ry. Co.* v. *Huxoll*, 245 U. S. 535).

III.

Petitioner's third proposition contends that Ferguson met his death as the result of a risk assumed by him.

In support of that proposition, the petitioner presents some general statements of the law relative

to assumed risk, but it is believed they are wholly inapplicable to this case. The jury found that Ferguson's death was caused by negligence of the petitioner in failing to comply with its self imposed duty of ringing the bell as the train passed through the yard. No complaint is made in this court of that finding.

There being no contention that Ferguson knew of the dangerous proximity of the train, in time to have avoided being injured by it, it is confidently believed that the issue of assumed risk was not raised; but, if it was in fact raised, it was certainly an issue of fact to be determined by the jury, and having been so determined adversely to the petitioner, there is no merit in its contention.

We feel somewhat disposed to apologize for calling attention to the fact that it is the well established doctrine of this court, that one does not assume the risk of injuries resulting from negligence unless he knows of the particular negligence, and appreciates the danger to him, or the negligence is so open and obvious that in the discharge of his own duties he would have become apprised thereof, and appreciated the danger arising to him therefrom.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

IV AND V.

Under the above heading the petitioner contends that the Supreme Court erred in failing to reverse outright the judgment of the District Court, and in reversing the judgment of the Court of Civil Appeals.

These contentions have been so fully and completely answered in our answer to preceding propositions presented by the petitioner, that we deem it unnecessary to discuss them further.

VI.

Petitioner's sixth proposition contends that the Supreme Court of Texas failed to follow the rules of law established in the Federal Courts in construing the Federal Employer's Liability Act.

We do not find any warrant in the record for this charge made against the Supreme Court of Texas.

We very readily agree that the applicable decisions of the Supreme Court of the United States, control the rights of the parties to this suit insofar as the points have been passed upon by the opinions of this court. However, we call attention to the fact that the rights of the parties have been ruled by the applicable decisions of the Supreme Court of the United States, and that we have relied upon those decisions for our contentions in this case.

Sustaining our contention that the evidence was sufficient to support the jury finding that Ferguson had been working between the cars of the freight train that was being made up when the passenger train approached, and that he suddenly stepped from between those cars and come in position to be struck by the freight train, we have cited:

Myers v. *Pittsburg Coal Co.*, 233, U. S. 184.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.
Choctaw & G. Ry. Co. v. *McDade*, 191 U. S. 64.

To sustain our contention that contributory negligence was an issue of fact for the jury, we have relied upon:

Railway Company v. *Stout*, 17 Wallace, 657.
Richmond & Danville Railway Co. v. *Powers*, 149 U. S. 43.
McDermott v. *Severe*, 202, U. S. 600.
Kreigh v. *Westinghouse, etc. Co.*, 214 U. S. 249.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

Supporting our contention that the issue of assumed risk was correctly determined against the petitioner, we have cited:

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

We respectfully submit that this case was correctly disposed of by the Supreme Court of the State of Texas, and we pray that the petition for certiorari be in all things denied.

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CHARLES ELMORE C
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No. 349.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS GRANTED.

BRIEF OF RESPONDENT.

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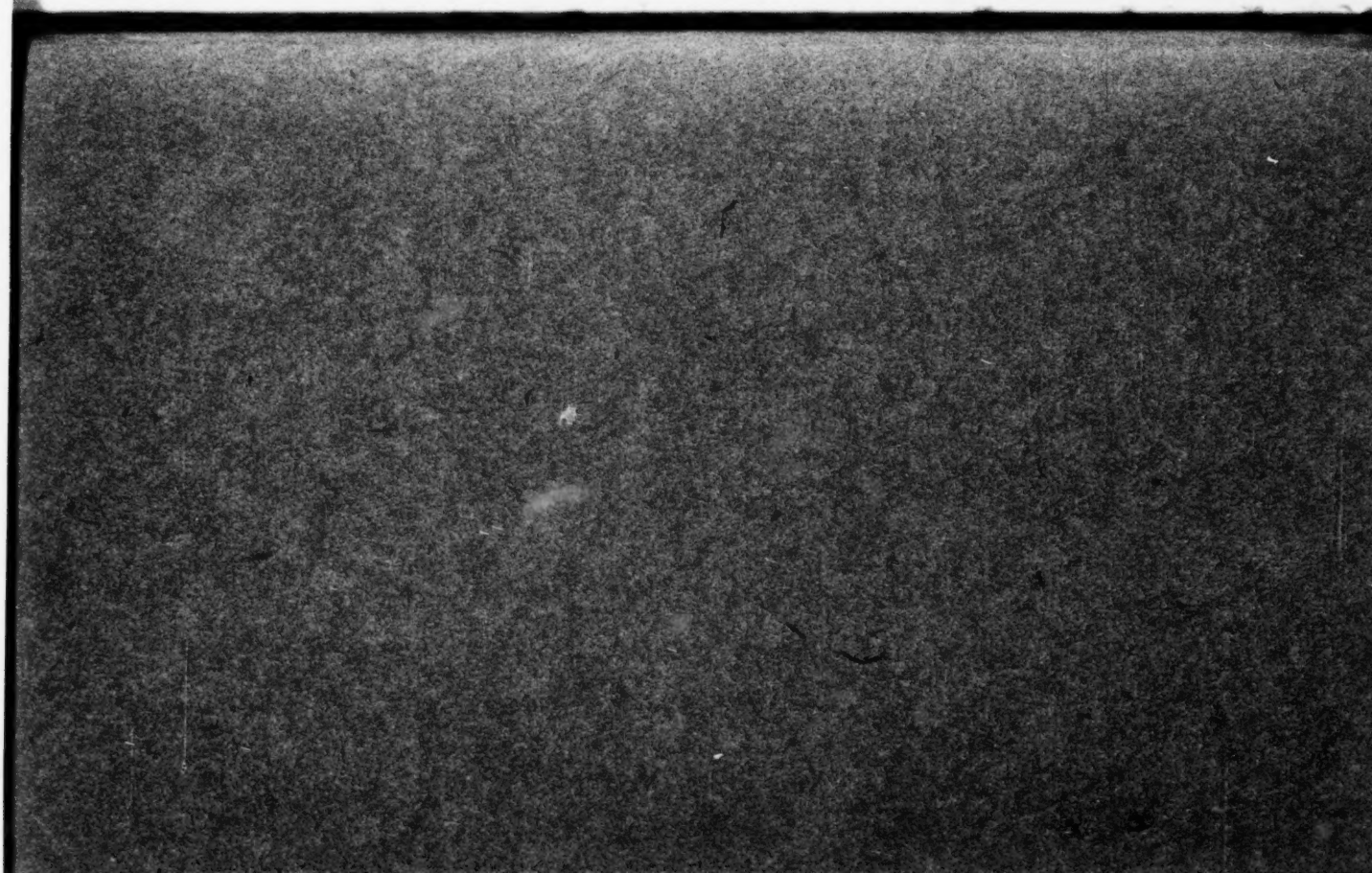

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FOREWORD.

Where a maximum amount of efficiency of a car inspector is sought, by the master inducing him to rely upon the sharp sound of the bell to warn him of the approach of a train, injury caused by the breach of this implied contract of protection, justifies the jury in finding negligence, and acquitting the servant of contributory negligence.

GENERAL STATEMENT.

The respondent filed a brief resisting the petition for certiorari. The writ having been granted, the respondent presents this brief supporting his contention that the judgment of the Supreme Court of Texas should be affirmed.

The Court of Civil Appeals of Texas rendered three opinions in this cause. It first reversed the case upon the sole ground that the deceased was guilty of contributory negligence as a matter of law, and that the damages should have been diminished (R. 180). It then granted respondent's motion for rehearing, and held that the question of contributory negligence was an issue of fact correctly determined by the jury and affirmed the judgment of the trial court (R. 237). It then granted petitioner's motion for rehearing and in a majority opinion (the Chief Justice dissenting) returned to its first opinion (R. 244).

The Supreme Court of Texas granted a writ of error, and held that the deceased was not guilty of contributory negligence as a matter of law, but that it was an issue of fact, and that the second opinion of the court of civil appeals which affirmed the judgment of the trial court was correct, and it accordingly adopted that opinion, and reversed the court of civil appeals, and affirmed the judgment of the trial court (R. 326).

The respondent contends that the evidence was sufficient to justify the jury in finding that the petitioner

was guilty of negligence in several particulars which caused the injury, especially in failing to ring the bell, and that deceased was not guilty of contributory negligence. We feel that if this court shall so conclude, that it will not be interested in determining the question of procedure as to whether the Supreme Court of Texas correctly granted the writ of error. But believing as we do that the petition and brief for certiorari does not fully and fairly present the facts in this case, and that the facts when fairly considered sustain the findings of the jury as approved by the Supreme Court of Texas, establishing liability of the petitioner, and acquitting the deceased of contributory negligence; tedious as it may appear, we feel it our duty to present in this brief, somewhat fully, the testimony upon which we rely.

The Supreme Court of Texas held that the verdict of the jury establishing negligence of the petitioner in failing to ring the bell which operated as a proximate cause of the death of deceased, and the verdict of the jury acquitting the deceased of contributory negligence, were sustained by the evidence as issues of fact; and that therefore the judgment of the Court of Civil Appeals of Texas holding that the deceased was guilty of contributory negligence as a matter of law, should be set aside, and the judgment of the District Court of Bowie County, Texas, should be affirmed. Accordingly, judgment was rendered by the Supreme Court of Texas in favor of the respondent so disposing of the case.

We contend that when viewed in the light of the well-known duty to make a very careful inspection of the cars before sending a train out on the road, it is apparent

that the self-imposed custom, of the master causing the bell to be rung to sharply and decisively warn the car inspector of the dangerous proximity of a train, amounts to an implied contract to procure a high standard of inspection, as well as a maximum amount of work, by relieving the inspector of the burden of keeping constantly in mind the necessity of keeping a lookout for the approach of trains. It plainly enables the inspector to give not only his whole time to the work of inspection, but more important, the concentration of undivided thought.

While this court will probably dispose of this case on its merits as shown by the record, without concerning itself with whether the Supreme Court of Texas correctly assumed jurisdiction, and reviewed and reversed the decision of the court of civil appeals; nevertheless we feel it our duty to direct attention to an erroneous position taken by the petitioner, in its petition for certiorari, with reference to the statutes of Texas.

We regret to find it necessary to refer to the fact that the petition for certiorari page 5, contains an erroneous statement of the Statute of Texas regulating the jurisdiction of the court of civil appeals of that state. The language contained in the petition for certiorari being:

> "It also appears that under the Statutes of Texas 'the judgments of the courts of appeals shall be conclusive on the law and the fact' (Complete Texas Statutes 1920, Article 1591)."

It is believed that the plaintiff in error should have corrected this erroneous statement, for it is an in-

correct statement of the statute. Said statute provides (Complete Statutes of Texas, 1920, Art. 1591, Texas Revised Civil Statutes 1925, Art. 1821):

> "The judgments of the court of civil appeals shall be conclusive on the law and fact, nor shall a writ of error be allowed thereto from the supreme court in the following cases to-wit:"

Then follows a list of cases in which such judgment is final, but none of which embrace a case of the kind we are now dealing with. Said list being:

1. Any civil case appealed from a county court etc;
2. All cases of Boundary;
3. All cases of Slander;
4. All cases of Divorce;
5. All cases of Contest at Election etc;
6. Interlocutory orders appointing Receivers etc;
7. Where Appellate Jurisdiction is not given to the supreme court etc.

It is believed that any Texas lawyer should know that this case does not come within the provision making the judgment of the Court of Civil Appeals of Texas final, but is within the provision of Article 1728, Texas Revised Civil Statutes of 1925, which gives to the Supreme Court of the State of Texas, the right to review errors of law committed by the court of civil appeals, and in accordance with which provision the Supreme Court of Texas granted the writ of error, and reviewed the judgment of the court of civil appeals in this case. Therefore if this court shall conclude from the evidence that the deceased was not guilty of contributory negligence as a matter of law,

but that it was an issue of fact, it will respect the verdict of the jury acquitting him of contributory negligence, as adopted by the decision of the Supreme Court of the State of Texas, affirming the judgment of the trial court.

It is confidently believed that the statement made by the petitioner, page 5 of its petition for certiorari, that:

> "The essential facts upon which the court of appeals made its finding that the decedent was guilty of negligence proximately contributing to his death, are not in dispute," is incorrect—certainly it can not be considered a fair statement of the record.

Inasmuch as we can not agree with the statement of the petitioner as to the evidence, and the conclusions reached by it therefrom, we will present from the record sufficient testimony to support our contention.

STATEMENT.

There was sufficient evidence to support the finding that the whistle was not sounded and the bell was not rung.

The witness, Mrs. Ona Carlisle testified (R. 76):

> "The bell was not ringing, and the whistle was not blowing before it left my house, nor after it passed my house, and it didn't ring and no whistles were blown until after it stopped."

Rupert Ferguson, who was at home about even with where the deceased was killed, testified (R. 99):

> "As the passenger train passed my place going into the station, the bell wasn't rung, and the whistle had not blown before it passed our place."

Jewell Lewis, testified (R. 88):

> "The whistle was not blown that night as the train came into the Leesville yard, nor was it blown between the stations of Staples and Leesville. The reason I am so positive of this is we were waiting outside of Mr. Brogmans for the train to whistle for Leesville as we were intending to start for home upon hearing the whistle."

She also testified (R. 89):

> "As stated the bell on the engine was not rung at any time that night as the train came into the station of Leesville, and my reason for saying this, is, as previously stated, we were sitting in a car out in the road in front of Mr. Brogman's house, waiting for the train to whistle for Leesville when we expected to start for home; therefore, my attention was directed to the train coming in, and situated as I was, I know I would have heard the bell had it been ringing."

It was customary for the bell on the passenger engine to be sounded, as the train passed through the Leesville yard to warn car inspectors and other employees of the dangerous proximity of the train; in fact it was conceded that it was petitioner's duty to do so.

Andrew L. Cox, a witness produced by the petitioner, testified (R. 132):

> "I knew that they made up freight trains there in the yard both day and night, and I knew that it was necessary to ring the bell as I went in there to warn the brakeman or car repairers and car inspectors, or whoever might be near the main line, to enable them to avoid getting hurt."

L. Polete, a witness for petitioner, testified (R. 126):

> "It is customary for me to blow my whistle about a quarter of a mile south of Leesville, that is, from the depot, and it was customary for me to ring the bell as I went through the yards and into the station at Leesville; in other words, the bell would start ringing at the south end of the yards and on into Leesville station, that was customary; our rules required the bell to be rung along in that place, that is why it rang along there."

The same witness (R. 127) testified:

> "It was necessary to ring the bell as I went through Leesville to give warning to any people who might be working in the yard, that was the purpose of ringing the bell, so as to sharply attract the attention of the people that might be there and let them know that the train was coming, that was the idea."

W. R. Proud, a witness for petitioner, testified (R. 130) bottom of page:

> "The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yards that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself and is a warning of the presence of the train."

The evidence justified the jury in finding that deceased was actively inspecting the cars of the freight train that was being made up, and was not guilty of contributory negligence.

L. E. Crawford, a witness for the petitioner testified (R. 145):

"If I remember right about twelve or fifteen cars had been thrown down to the caboose up to the time the passenger train came in, may be not that many, or may be more."

The witness, T. H. Burke, testified (R. 135):

"After I saw Mr. Ferguson, I put some cars on this passing track, I put all of them that I ever put in there on the track after that time. The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night." (The "plug" referred to by this witness was the passenger train that killed Ferguson.)

Travis Barnhill, testified (R. 104) that he and Reed Holton while walking down the railroad track going south from the depot at Leesville, passed the deceased, and at the time he was standing near the end of cars which were attached to the caboose on the passing track, and that his lantern was setting on the ground. That they walked slowly and travelled about one-half mile before they met the passenger train. He says on page 105:

That it couldn't have been over fifteen minutes after he passed deceased, that he met the passenger train.

A. H. Thorla, testified (R. 111):

That a short time before the passenger train came in, he passed near the north end of the cars which were on the passing track.

"As to how close to the north car I passed it was thirty or forty feet; I was east from the north end of the car when I passed it. I didn't cross the track there, I went up the yard further north. When I passed that car that I spoke of I saw Mr. Ferguson walking around there."

This witness also testified as to the distance he travelled before the passenger train came in (R. 112) which would indicate that it was some four to ten minutes between the time he saw Ferguson and the time the passenger train came in.

Nick Franklin, the car inspector who went on duty after Ferguson was killed, testified (R. 94):

> "There were about fifteen cars on that train south of where Mr. Ferguson's body was found, I suppose, something like that, and all of those cars had the air hose connected up, but the air hose on the cars north of his body had not been coupled up."

M. J. Miller, a witness for the petitioner, testified to finding Ferguson's lantern (R. 161) a few minutes after he was killed:

> "The lantern was facing the cars on the side, or passing track—facing east in other words, seventy-seven feet south of Mr. Ferguson's body, and I took the lantern down there and saw that he was dead."

This witness also testified (R. 162):

> "The first piece of flesh found was about 40 feet from the lantern, about the size of the end of your thumb, and from there on up you could see where his body had been rolled; a little more than half way from the lantern to the body is where I found this flesh; that was the first place where I found any sign of where the body had dragged or rolled, and there was evidence of dragging and rolling all the way down from that point on down to where the body was."

A. S. Cox, fireman on the engine that killed Ferguson, testified (R. 132 and 133):

> "I saw some cars there on the railroad track east of the light, they were on the next track east of my track. I never worked as a car inspector. I do not recall where that light was with reference to the north end of that string of freight cars, I have no idea, I just know it was somewhere along the cars. I don't know whether it was at the opening between the cars where they are coupled together, or alongside of the cars. The light was not facing us exactly, it was facing toward the passing track, but I could see the side of it, and my idea was that it was facing those cars on the sidetrack, that is the way it impressed me."

L. Polete, engineer on the train that killed Ferguson testified (R. 124):

> "I did see a lantern in the yard there at Leesville, I saw a car repairer's lamp sitting on the ground between the tracks, between the main track and track number one, supposed to be the passing track, but I did not see Mr. Ferguson."

Again he testifies (R. 126-127) with reference to this light:

> "There were a string of freight cars and box cars east of that light. That was a track on which they frequently made up trains."

A. L. Cox testified (R. 132) with reference to keeping a lookout:

> "I went right on by it, and into the station, and did not see anybody. I saw some cars there on the railroad track east of the light, they were on the next track east of my track."

The engineer on the passenger train testified that he kept a lookout and saw no one on the track or near the inspector's lamp—saying (R. 124):

> "In approaching and going through that yard I was keeping a lookout; I kept a lookout in the yards, and also along the lines that I travel on. I did not see Mr. Ferguson or any other man on or near the track in going through those yards that night. I did see a lantern in the yards there at Leesville, I saw a car repairer's lamp sitting on the ground between the track, between the main track, and track number 1, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man about this light whatever."

He also testified (R. 127):

> "It was my duty in going into Leesville to keep a lookout in front of my train for any obstructions that might be on the track, or anything of that kind, and if there were any persons on or about the track, it was my duty to blow the whistle and warn them that they were in danger."

Petitioner makes the contention that deceased had no duties to perform on the west side of the cars. It is a matter of common knowledge that both sides of the cars must be inspected and the witness, R. L. Morgan, testified (R. 159):

> "If there is no crew down there, there is no reason why he wouldn't be on the west side if he wanted to, but it is not convenient for them to work on the west side while the train crew is actually working in putting cars on the caboose, but while the train crew is off some other place they can work on the west side just as well as on the east side. For instance, if there is 15 cars

> in there, and he has to connect up the hose, he can do it on either side while they are away, there is nothing to keep them from either side; he could inspect it and connect up his air hose, and it would make no dfiference which side he worked on while the engine was away."

Nick Franklin, a car inspector of many years experience testified with reference to the manner in which a train is inspected as it is being made up as follows (R. 94):

> "The usual practice of inspecting the train was that we would go up each side, up one side and down the other, and make a general inspection of the cars and test the air, and see that it was all right, and inspect the safety appliances, I inspected this train in that way on that night."

He also testified (R. 95):

> "In making the coupling of this air, after finishing that, he would step out between the tracks, and go up to the next coupling and do the same thing, and then step out, that was the customary way in which it was done."

He also testified (R. 95):

> "The inspector would make light repairs; if he found light defects he would repair them, and in the process of his work he would keep on building the train up as I have described until it was finished."

Franklin also testified (R. 95) that in his judgment with cars on both tracks, there would be a free space of four or five feet.

Franklin testified (R. 115) that it was customary for the inspector to set his lamp down where it would shine on the coupling between the cars and then couple the air hose.

> "With reference to moving away from the opening between cars after coupling the air hose, and inspecting the safety appliances, and the distance that they would move away from the car after having made said inspection, he would step back in the clear from the train that was being made up; I would say that he would ordinarily move back several feet, maybe two, or three or four feet. A person making the inspection of a train that way, would move away from the standing cars about 2 or 3 or 4 feet, step back in the clear several feet, that is the practice and habit of inspectors."

Cox, the fireman on the passenger train that killed Ferguson first learned that Ferguson had been killed when the train reached Many, some distance north of Leesville, and inspected the pilot and testified (R. 97):

> "I saw blood on the pilot beam, on the ribs of the pilot or cow catcher, and on the step on the right side of the engine. The blood was all over the pilot beam, scattered different places, and in spots, on the right hand end of it, that is the engineer's side of the engine, it was all over the end of it, scattered around in different places, on the front of it."

G. W. Lillie, master mechanic at Shreveport, testified with reference to the height of the pilot beam of the engine that injured Ferguson (R. 175):

> That it was ten feet long, 41½ inches from top of pilot beam to the top of the rail, 5 inches from the top of the rail to the top of the tie and six inches the width of the tie. A total of 52½ inches.

The deceased had been a car inspector for petitioner at Leesville for some 10 or 12 years, and was faithful and competent in his service as disclosed by the testimony of his foreman, C. S. Allen, who testified (R. 157):

> "Mr. Ferguson was car inspector under me about two years and six or eight months; he was never laid off during that time, and there was never a black mark against his work during that time; I never so much as had a criticism against his work, that I can recall."

NOTE. This evidence was sufficient to sustain a finding that the freight crew placed 15 cars against the caboose 20 or 25 minutes before deceased was killed; and that he was standing at the north end of these cars waiting to see if other cars would be presently sent down, when Barnhill and Holten passed him 15 or 20 minutes before he was killed. That his lamp having been found 77 feet south of his body, with signs that his body had been dragged or rolled a great part of this distance, and that Nick Franklin, the car inspector found the cars south of his body coupled, and that the engineer and fireman though keeping a lookout did not see him, that he was engaged in work between the cars with his lamp on the ground facing the coupling, and that he came from between the cars after their vision had passed beyond

his lamp; and by reason of the failure to give the customary warning by ringing the bell, which he had formed the habit of depending upon, his attention was not drawn to the near approach of the train, and he stepped near enough to the main line to be struck by the pilot beam; at best, there was a free space of only 6 feet—less than 2 steps would have brought him in the path of the pilot beam.

It is clear that the jury had the right to believe that Ferguson had placed his lamp upon the ground, and had gone between the cars to do some work, and was not in view of the engineer and fireman as they approached his lamp, and that he was not at the end of that string of cars when struck by the train.

He was last seen with his lamp in his hand near the end of the cars, and he certainly carried the lantern back 77 feet about 2 car lengths, and placed it on the ground, and apparently his body was struck at that point, knocked 40 feet and then rolled on the ground 37 feet, for Nick Franklin found the cars coupled and the air hose connected from his body south to the caboose; and as the engineer and fireman observed that there was a string of cars alongside the lantern and to the east thereof, the jury certainly had the right to conclude that he had gone south alongside those cars, had passed between them, and was thus out of view of the engineer and fireman; and so located and engrossed with his work as that he did not notice or become apprised of the approaching train, and its close proximity, but

would have done so and avoided the injury had the bell been ringing as was its custom, and as he had the right to expect—the wound on his torso was about the height to have been caused by the pilot beam.

It is confidently believed that there was also sufficient testimony to justify the jury in finding that the bright headlight aided in preventing him from keeping clear of the train, by confusing him when he unexpectedly came in its path as he stepped from between the cars.

REMARKS.

The importance to the traveling public and the employees of the railway company of the car inspector carefully and faithfully performing his duties, is so great that his duties should be discharged under the most favorable surroundings, and with the view of his mind being concentrated on that particular work.

The petitioner seems to have fully appreciated this, for instead of requiring the inspector to depend upon his knowledge of the time the train would pass, it required that trains passing along where inspectors might be engaged in their work, should ring the bell to ~~shortly~~ sharply apprise them of their approach.

The necessity of that self-imposed custom and duty being discharged, must be apparent to any one, and the failure of its performance was sufficient to authorize the jury to find that it constituted a negligent breach of duty owing to the inspector.

It is believed that it should be apparent to any one that where a person who is required to so fully and carefully inspect cars, has become accustomed to rely upon the warning given by the sharp distinct sound produced by ringing the bell, that the failure to perform that duty, constitutes negligence that is liable to result in just such an injury as we have here.

The petitioner contends that the violation of the custom of ringing the bell, did not constitute negligence proximately causing this injury; arguing that the deceased might have ascertained the presence of the train in other ways than through the warning given by the bell, but inasmuch as it imposed upon itself the duty to ring the bell, the man for whose benefit it was to be rung, was entitled to the chance of avoiding injury by its warning.

The petitioner contends that the deceased saw the bright headlight, and thereby knew of the approach of the train. The jury was authorized in finding that if he was blinded by the headlight, that it was at such time and place, and so near as to confuse him, and that had the bell been sounded as was the custom, the near approach of the train would have been discovered, and his death avoided.

The attorneys for the railway company in their brief discuss the ability of Ferguson to have ascertained the approach of the train by hearing the noise or seeing the headlight, as if watching for trains was the major portion of his duty. It is not difficult for attorneys who sit in their office, to satisfactorily the-

orize as to how Ferguson could have easily discovered the approach of the train. It is not difficult for those who have never engaged in work in railroad yards, or even studied the duties and responsibilities of car inspectors in connection with their opportunity to discover the approach of trains, to satisfy themselves that the noise of an approaching train or the headlight is sufficient warning of its approach, and that the car inspector who relies upon the customary sharp decisive warning of the ringing bell, must be held to have been negligent in failing to discover the approach of the train; but while this same theorizing sometimes is found to prevail in the minds of the judiciary, who are equally ignorant of the duties and responsibilities of car inspectors, nevertheless to one familiar even as a spectator with the manner in which the work of these men must be done, and the responsibilities that rest upon them, it is easy to realize that they are entitled to the customary warning that has been adopted by ringing the bell to warn them of the immediate approach and dangerous nearness of the approaching train; hence it is wise to leave these matters to a jury as being best qualified to pass upon the issue of contributory negligence.

It does seem that it ought to be a matter of the commonest knowledge that the work of a car inspector who is inspecting a train that is being made up, is of very great importance, and that his whole soul should be concentrated in that work, both for the expeditious dispatch of the business of the master, and for the

thoroughness of the inspection for the protection of the travelling public, and the other employees of the common master; but if there is doubt about the matter, we only have to look to the testimony of the witness, T. H. Burke (R. 137, who testified in substance that the only man in the railroad service upon whom rests a burden so great for the safety of the trains, and the travelling public and employees generally as the car inspector, is the dispatcher who keeps the trains from coming into collision as they are being operated over the road.

It seems to us that it is axiomatic that the work of the car inspector is of so much importance—that so much depends upon its intelligent and faithful performance, that everything practical should be done to permit, in fact cause him to discharge his duties under the most favorable circumstances, and to relieve him insofar as it is possible from the necessity of assuming the responsibility of carrying other matters in his mind than the careful and faithful inspection of the cars. The petitioner doubtless viewed it from that standpoint when it inaugurated the self imposed custom and duty of causing the engine bell to be sounded as the trains pass along where the car inspector is engaged in his work—thus advertising to him that he may only carry in his mind the subconscious thought that if a train approaches and reaches the danger zone—gets near enough to endanger his safety while he is performing his work, that he will be advised thereof by the sharp ringing of the bell which all of the witnesses

who speak upon the subject say, is a separate independent warning which can be heard above all the other noises, and apprises him of the dangerous approach of the train.

We do not agree with the following contention in the petition for certiorari, page 5:

> "The essential facts upon which the court of appeals made its findings that decedent was guilty of negligence proximately contributing to his death, are not in dispute."

In fact—the contention of the court of civil appeals is not supported by the record. That court theorized without evidence to support it, that the deceased was sitting or squatting near the main line, and negligently failed to discover the approach of the train or to leave his place of danger; notwithstanding the testimony of the engineer (R. 124), and of the fireman (R. 132), was that they were keeping a lookout, and the deceased was not on or about the track as the train approached the inspector's lamp. The contention of the court of civil appeals is in fact in direct conflict with this testimony, and is contradictory of the theory on which the case was tried.

It was contended—in fact apparently not disputed, that the deceased came somewhat suddenly into the path of the train. This is emphasized by the declaration of the petitioner in its motion for rehearing in the court of civil appeals filed February 26th, 1926 (R. 220), where on page 223 R., it says in said motion for rehearing:

> "The evidence circumstantially, and without dispute, shows that the deceased suddenly, and at a time when he could not—been seen by the engineer or fireman, brought himself in such proximity to the track upon which the train was being operated, as to cause him to be struck and killed by the same."

It is certain that there was an abundance of testimony in the record to contradict the theory that the deceased was in a sitting position on the main line track, or near it as the train which killed him approached—in fact it is believed that the great preponderance of the evidence clearly shows as was contended throughout the trial of the case, and the presentation of it in the court of civil appeals, that the deceased was struck while in an upright position by the pilot beam of the engine, and his body knocked a distance of some 30 or 40 feet before it struck the ground, and then rolled some 35 feet further.

Bearing in mind that deceased was last seen alive (R. 111) walking along side the cars, and near the north end thereof, just a few moments before he was killed, and that the engineer and fireman saw the lantern along side and facing those cars, and did not see deceased, and that his body was found at the north end of those cars 77 feet from the lantern, with unmistakable evidence that it had been rolled a great part of that distance, the jury was justified in finding that he had passed 77 feet, practically two car lengths, south along side those cars after Thorla saw him, and that he placed his lantern on the ground to shine upon

the coupling while he passed between the cars to do some work; and depending upon the sharp noise made by a ringing bell, he stepped from this position and came in the path of the engine, without realizing its dangerous approach, and that he probably was also confused by the bright headlight which aided in causing him to be struck.

We summarize the testimony supporting these findings of the jury:

One looking into a bright headlight such as this engine carried, is momentarily blinded; witness, Nelson, R. 85; witness, Franklin, R. 116. Thorla saw him near the end of those cars with his lantern in his hand only a few moments before he was killed (R. 111).

The engineer, R. 124, the fireman, R. 132, saw his lantern on the ground along side the cars, and though keeping a careful lookout, did not see deceased.

The body was found 77 feet north of the lantern with marks on the ground between, justifying the jury in finding he was struck at the lantern (R. 161).

Nick Franklin, the car inspector who took up the work where deceased left off, found all the cars south of his body coupled, and the air hose connected (R. 94). It was customary for the car inspector when coming from between cars to step back several feet toward the main line (R. 116).

It was not unusual for a car inspector to do his work of inspecting cars on that track on the west side thereof, and between those cars and the main line (R. 159).

In this connection we are not unmindful that the petitioner contends that the deceased was wrongfully on the west side of the freight cars, but in this respect it makes the mistake so often made in its brief, of assuming that testimony offered by it, should be accepted as true and final, though contradicted by reputable witnesses. This theory is contradicted by R. L. Morgan, a witness produced by it, who testified (R. 159):

> "If there is no crew down there, there is no reason why he wouldn't be on the west side if he wanted to, but it is not convenient for them to work on the west side while the train crew is actually working in putting cars on the caboose, but while the train crew is off some other place they can work on the west side just as well as on the east side. For instance, if there is 15 cars in there, and he has to connect up the hose, he can do it on either side while they are away, there is nothing to keep them from either side; he could inspect it and connect up his air hose, and it would make no difference which side he worked on while the engine was away."

The jury had the right to accept all of this testimony, though some of it may have been contradicted. If accepted it showed that deceased went from where Thorla saw him some two car lengths (77 feet) south along side those cars, and placed his lantern upon the ground, for Nick Franklin found all cars south of his body coupled and the air hose connected; this could not have been if any part of the string of cars south of his body had been brought in after he was struck.

Inasmuch as this evidence was sufficient to show that the deceased was between the cars at the point

where his lantern was found, and for that reason was not seen by the engineer or fireman, the jury had the right to find, that depending upon the customary practice of the bell being rung to warn him, the deceased stepped into the path of the train after the fireman and engineer had ceased to look at that part of the track where he had placed his lantern. This is especially true in view of the fact that most of the material evidence showing and tending to show these facts, was furnished by witnesses produced by the petitioner.

The jury was justified in finding that Ferguson stepped from between the cars where he was working, after the engineer and fireman had ceased to observe the track in front of them, and that being misled as to the distance of the approaching train, by reason of the custom of ringing the bell not having been followed, and probably confused by the bright headlight, he accidentally came in the path of danger and was struck by the pilot beam and killed.

The question of whether Ferguson was guilty of contributory negligence, could not be resolved against him as a matter of law, but if raised by the evidence, was an issue of fact for the determination of the jury, and if so, this court will not be concerned with the disposition of that issue of fact by the jury, and approved by the Supreme Court of the State of Texas; therefore, the theory that Ferguson was guilty of contributory negligence as a matter of law, insisted upon by the petitioner, is without merit.

Considering the other contention of petitioner, namely: That Ferguson met his death as the result of

a risk assumed by him, we really fail to appreciate the force of petitioner's contention. It has been determined by the jury, and by the Supreme Court of the State of Texas, that Ferguson met his death as the result of negligence—in that petitioner failed to comply with the custom which it had voluntarily established of ringing the bell as that particular passenger train passed through the yard at Leesville, as a means of safety to the car inspectors, by bringing sharply to their attention, that the approaching train was dangerously near. There is no contention that this custom had ever been breached before the time Ferguson was killed, and certainly Ferguson did not assume the risk of dangrs presented through the negligence of his master—not having any notice of even a remote probability of such negligence.

When one considers the manner in which Ferguson's duties were discharged, and the necessity of prompt performance in getting out the freight trains of the master, the necessity for establishing the custom of through trains ringing the bell as they passed along where his work was to be done, becomes manifest, but we are not dependent upon the wisdom of this requirement being visited upon the master, for it appears without controversy, that the petitioner had voluntarily established that custom as a means of protection to men engaged in the very work in which Ferguson was engaged (R. 130 bottom of page). Certainly the petitioner could not establish a custom or usage for the benefit of Ferguson, and then contend that Ferguson assumed the risk of it not discharging the voluntary burden it had assumed. In other words, it cannot be

reasonably contended that Ferguson should have anticipated that the master would be negligent in the very particular of violating a custom which it had established for the protection of the very person who was injured by the negligent breach of that custom.

Ferguson did not assume the risk of injuries due to the master's negligence, unless he knew of the negligence and appreciated the danger to himself therefrom in time to, in the exercise of ordinary care, have avoided injury. This doctrine is axiomatic and is fully discussed in *Gila Valley Railway Company* v. *Hall*, 232 U. S. page 94.

There being no contention that Ferguson knew, or had any reason to anticipate negligence such as resulted in his death, the doctrine of assumed risk was not a question at issue in the case, but certainly if it could possibly be contended that it was raised by the evidence, it was an issue of fact which the jury has in its prerogative resolved against the master, and its decision is final.

Inasmuch as it was conceded by both the plaintiff in error and defendant in error on the trial of this case that Ferguson was not on the main line, or between the train that was being made up on the side track and the main line, until the train that killed him reached a point near where his lantern had been left between the main line and the train that was being made up, and that Ferguson thereafter came in such close proximity to the main line as to be struck by the pilot beam and killed, the jury had the right to conclude (as it did), and find from the evidence that Ferguson

was busily engaged in some work between two of the cars of the train that was being made up, such as coupling the air hose, or doing some other work necessary, and that he finished the work, and stepped from between the cars and far enough away from them to be struck by the pilot beam. No rule or custom prescribed the distance Ferguson might step from the freight cars. Then viewing these facts in connection with the fact that the plaintiff in error established the custom of causing the bell to be rung as the passenger train passed through the yards for the purpose of warning car inspectors of the approach of the train (as testified to by the conductor of the passenger train, R. 130), and the dangerous proximity thereof, and that the Supreme Court of Texas has accepted the jury finding that a failure to ring the bell on the occasion in question, was negligence which proximately caused the death of Ferguson, we must view the finding of the jury that Ferguson was free of contributory negligence in light of all of these circumstances. That is to say in balancing the evidence on the issue of Ferguson's contributory negligence, the jury had the right, and in fact it was its duty, to take into consideration the character of work in which Ferguson was engaged, including the common knowledge as well as the testimony to that effect, that Ferguson was to do the work of inspecting and connecting up the freight train somewhat hurriedly so as to avoid delaying that train; and the fact that Ferguson knew that the plaintiff in error had voluntarily established the custom of ringing the bell on the train as it passed through the yard, so as to

give him timely warning of its dangerous proximity; and the probability of Ferguson becoming confused when he stepped from between the cars by reason of the bright light, and made an effort to protect himself by turning from it to get his bearings, but which brought him in the path of the pilot beam; and if from all of these facts and circumstances, reasonable minds might differ as to whether Ferguson was guilty of contributory negligence in getting near enough the main line to be struck, then the finding of the jury in his favor on that issue is conclusive.

It occurs to us that it is very clear that the evidence raised an issue of fact as to whether Ferguson was guilty of contributory negligence, for even if he had known of the approach of the train, in view of the fact that the railway company had established the practice of ringing the bell to warn him of its dangerous proximity, when it should reach such a place as to make it dangerous to him, the jury had the right to conclude that Ferguson was not guilty of contributory negligence in failing to anticipate that the self-imposed custom would be on this occasion needlessly violated.

AUTHORITIES.

Evidence sufficient to show Ferguson's mind concentrated in his work.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Choctaw Oklahoma & Gulf Ry. Co. v. *McDade*, 191 U. S. 64.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.

Contributory negligence an issue of fact.

Railway Company v. *Stout*, 17 Wallace 657.
Richmond & Danville R. R. Co. v. *Powers*, 149 U. S. 43.
Kreigh v. *Westing House, Church, Kerr & Co.*, 214 U. S. 249.
McDermott v. *Severe*, 202 U. S. 600.
Shearman & Redfield—Negligence, 6th Ed. Sec. 114 (Note).

No assumed risk, if so issue of fact.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

The Court of Civil Appeals of Texas contended that Ferguson was sitting or squatting on or near the main line track, and negligently remained there until struck by the step of the pilot. The petitioner repudiated that theory (R. 222) in fact, the case was tried by both parties on the assumption that Ferguson came in the path of the pilot beam in an erect position. The Supreme Court of Texas reversing the court of Civil Appeals, held that the jury had the right under the evidence to conclude that Ferguson was not guilty of negligence. This case should not be confused with those cases in which it has been held that men who work on the track must protect themselves against the movement of trains which they know will be moved over the track without warning, such as:

Aerkfetz v. *Humphreys*, 145 U. S. 418.
Chesapeake & Ohio Ry. Co. v. *Nixon*, 271 U. S. 218.

It is a matter of the commonest knowledge that the very nature of the employment of a car inspector requires the concentration of his mind upon the work in which he is engaged, for upon its faithful performance, the safety of the train—the lives of employees and passengers—depend. This prompted petitioner to adopt the plan of ringing the bell, to notify Ferguson of the dangerous proximity of the train. The right of Ferguson to rely upon that warning, together with the character of his work, etc., must be taken into consideration in passing upon the question of contributory negligence.

PROPOSITIONS OF PETITIONER.

The respondent will now present an answer to the propositions of petitioner in the order in which said propositions are presented in its brief.

I.

In its first proposition the petitioner contends that Ferguson was guilty of negligence which as a matter of law contributed to his death.

Inasmuch as the burden of establishing contributory negligence was upon the petitioner, and it was submitted to the jury (R. 16) and found against it (R. 37) this court will not be interested in considering the question further than to ascertain that the evidence was not so conclusive of contributory negligence as that reasonable minds might not differ as to whether it existed.

That is to say when it shall be made to appear to this court that there was substantial evidence raising an issue as to whether Ferguson was guilty of contributory negligence, this court will accept the finding of the jury on that issue.

The petitioner used the sidetrack next to the main line for making up north bound freight trains; there was testimony that there would be a clear space of only four or five feet between cars on that track and a passing train (testimony of Nick Franklin, R. 95). The car inspectors might inspect from either side of the cars (R. 159); the petitioner had established the custom of requiring the engine bell to be rung on north bound

trains passing over that part of the main line to sharply notify car inspectors when such trains reached a place where they would endanger their safety. Conductor Proud said (R. 130, near bottom of page):

> "The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yard that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself, and is a warning of the presence of the train."

The petitioner had established the common sense practice or custom of having the car inspector inspect its freight trains as they were being made up, beginning with the first cars shunted in to the caboose, and if practical have the work of inspecting the train finished by the time the last car was placed in same. After detailing how an inspector would inspect those cars, Nick Franklin testified (R. 94):

> "He did it in the most expeditious way owing to the speed the cars were being put in."

Nick Franklin, a car inspector of long experience in describing the manner of making inspection of freight cars while a train was being made up on the track next to the main line (R. 116) testified that the inspector would set his lantern down and go between the cars and connect up the air hose, and says (R. 116):

> "A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, get back in the clear several feet, that is, the practice and habit

> of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed, that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when cars were on both tracks, there wasn't but three or four feet between the cars, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

It is true that the petitioner contends that the witness, Franklin, was only estimating the distance, but if we accept the testimony offered by petitioner (R. 119) that the distance from the center of the main line to the center of the side track is 15 feet, and the testimony of its witness, Lillie (R. 175) that the pilot beam was 10 feet long, it is clear to any one that one-half of that pilot beam takes off 5 feet from the 15, and that if a car on the other track was of equal width, it would take off another 5 feet, leaving a clearance of only 5 feet when both tracks were occupied—less than 2 steps.

T. H. Burke, the conductor on the freight train that was being made up after stating that his engine had placed some cars in on the passing track where the train was being made up, testified with reference to the time these cars were placed on the passing track before the passenger train came in as follows (R. 135):

> "The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night."

The witness, A. H. Thorla (R. 111) passed those cars placed in on the side track a very short time be-

fore the passenger train came in, and as he passed he saw Ferguson with his lantern moving along side the cars as if inspecting the same.

The engineer on the passenger train (R. 124) and the fireman (R. 132) each testified that as they passed through the yard they kept a lookout and saw a lighted lantern between the main line track and the cars on the side track, but that no person was between the tracks or on the main line.

No one saw Ferguson when struck by the pilot beam, and no one saw his movements immediately before he was struck. The petitioner accepts the silent, but impressive blood stains on the pilot beam as conclusive that it caused his death. The question of whether his conduct was such as to constitute contributory negligence must be determined by the circumstantial evidence which the parties have been able to produce.

There is no necessity of resorting to conjecture; for inasmuch as it was Ferguson's duty to inspect the cars of this freight train as they were being placed on the track next to the main line (R. 116); and inasmuch as he was killed in approximately twenty-five minutes after the time Conductor Burke says they placed a string of cars on that track (for him to inspect) and left it to go to the scale track (R. 135); and inasmuch as he was seen by Thorla passing along this string of cars within three or four minutes of the time he was killed (R. 111); and inasmuch as the inspector who took up the work after he was killed, found that some fifteen cars had already been

inspected, and the air hose connected up (R. 94); and inasmuch as the engineer (R. 124) and fireman (R. 132) as their train approached where he was killed, saw his lantern on the ground between the tracks; and inasmuch as it was the custom for car inspectors to place their lantern on the ground or end of the ties when they went between the cars to connect the air hose (R. 115); and inasmuch as Ferguson must have been between the cars, as the engineer and the fireman, though keeping a lookout did not see him as they approached his lantern; the jury had the right to conclude that Ferguson did not carelessly step from between the cars and into the line of danger, with knowledge or charged with knowledge that the train was then rapidly approaching; but rather, that being engrossed in his work and having become accustomed to take heed of the warning that the sharp sound of the ringing bell would give him, he was misled into believing that no train was within dangerous proximity to him, and probably was blinded by the glaring headlight, all of which confused him, and in his efforts to get to a place of safety, or to turn from the light so as to get his bearings, he inadvertently stepped into the path of danger, and received his injuries.

In passing upon the question of the presence or absence of contributory negligence on the part of Ferguson, we must remember that the burden was upon the petitioner to establish contributory negligence, and it has offered no testimony raising that issue, other than the fact that he was killed by a train

that was being negligently operated. In this connection, it is not amiss to consider that for many years Ferguson had faithfully discharged his duties without being injured. That he was a competent and careful man is emphasized by the testimony of the man who had been his boss for more than two years, who says (R. 157-158):

> "Mr. Ferguson was a car inspector under me about two years and six or eight months; he was never laid off during that time, and there was never a black mark against his work during that time; I never so much as had a criticism against his work that I can recall" (S. F. 136).

It is not amiss to remember that the negligence of the petitioner in failing to blow the whistle and ring the bell, is emphasized by the fact that the engineer and fireman with full knowledge that it was usual and customary for the petitioner to make up freight trains on the track immediately east of the main line, saw the car inspector's lantern shining eastward upon cars standing on that track, and did not see the car inspector; the jury certainly had the right to conclude that they knew or should have known that the inspector was between those cars engaged in his work, and that he was entitled to the warning that both testified should have been given to him;

The petitioner seems to misunderstand the scope and effect of the case of *Aerkfetz* v. *Humphreys*, 145 U. S. 418, and other similar cases, which are not at all applicable to the facts of this case. The Supreme Court in the Aerkfetz case merely held that one

and which other witnesse

working on a track over which cars were being constantly shunted in a switch yard, took the situation as he found it, and as there was no custom of notifying him of the approach of cars, negligence could not be predicated on a failure to do so. Likewise, having full knowledge of the fact that cars were constantly shunted over these switch tracks without notice being given to men working on the tracks, he assumed the risk of being injured by such movement.

This case is in line with the case of *McGovern* v. *P. & R. R. Co.*, 235 U. S. 389—and the case of *Sea Board Air Line Ry. Co.* v. *Konnecke*, 239 U. S. 353—in that the deceased had the right to act upon the assumption that the petitioner would comply with its self-imposed custom of ringing the bell to warn him of the dangerous proximity of the train.

It is probable that the deceased, like one who concentrating his mind on what he is reading, may be suddenly aroused by the stroke of a clock, though he has been oblivious to the chatter of those about him, had so trained his mind to be warned by the ringing of the bell of an approaching train, that he was entirely ignorant of the ordinary noise made by the train, notwithstanding others heard such noise.

One may assume that while the car inspector was engrossed in his work, if he in fact heard the rumbling, the ordinary noises of the approaching train, he concluded that the same came from the movement of the engine that was making up the freight train, and certainly that he may have concluded that there was

no train in dangerous proximity to him. In fact, we may go a step further and without resorting to conjecture easily reach the conclusion that he mistook the noises of the approaching train for noises of the engine that was making up the freight train, and that in stepping from between the cars where he was working, he hurriedly got away from them and looked to the north to ascertain whether the light and the noise were in fact from the engine of the freight train.

The petitioner says:

> "The giving of warning signals is merely an additional precaution to warn parties of the approach of trains lest they fail in their duty to use proper diligence. In other words, it is a double precaution to assist the non-vigilant in case they are lax in their duty to protect themselves."

One having the smallest modicum of knowledge of the operation of railroads and trains, readily appreciates the fallacy of that statement. Such customs are established so as to increase the output and efficiency of the workmen. The car inspectors and other workmen would be forced to measurably neglect, or at least delay the performance of their duties if they were required to assume the burden of discovering the approach of trains which suddenly come into the yard without warning. The petitioner saw fit to place upon the operatives of the locomotive the small burden of ringing the bell, thereby relieving the inspector of trying to carry the burden of anticipating and providing against danger from passing trains, as

well as the burden of charging his mind with the discharge of the duties connected with his job, including watching for engines on the track on which he was inspecting cars.

There has never been a rule of law—there probably never will be, to the effect that a person engrossed in his work which encompasses and embraces the necessity for looking out for cars which may be shunted in on others while he is between them making inspections, must neglect his work, and listen for a train, the approach of which he has the right to assume will be heralded by the ringing of a bell.

One is held guilty of contributory negligence where he relies on another not being negligent, only in those cases where the injured party is shown to have had full opportunity to have discovered the danger, and negligently failed to exercise care for his own safety; where without having anything to divert his mind to other matters, he carelessly gets in the path of pending danger; such as where a pedestrian heedlessly steps upon a railway track immediately in front of an approaching train. But where the testimony and inferences to be drawn therefrom; and the presumption that one killed has exercised proper care, raise the issue of the mind being drawn away from impending danger, the question of contributory negligence is for the jury.

There is nothing in this case to indicate that Ferguson did not have the right to get near or even upon the main line.

It is said Ferguson knew the time the passenger train would reach Leesville. But he certainly was not required to work with his watch in his hand—in fact it would have been impossible for him to do so; and why adopt the custom of ringing the bell instead of depending upon the ordinary noise of the approaching train, if men engrossed in their work could not rely upon it as a warning.

It is argued by petitioner that the train was visible and made much noise, and that deceased should have known of its approach; but such argument ignores the fact that petitioner was violating its custom of ringing the bell, and that the evidence justified the jury in finding that Ferguson was engrossed in his work, and in watching the movements of the switching train. It is believed that it has been quite universally held that where one is engaged in work, or has his attention in any way diverted from the danger, that he is not guilty of contributory negligence in failing to anticipate negligence of the wrong doer. Certainly if it be viewed as an original proposition, it must impress one that such rule should prevail, for it would be impossible for the traffic of the world to be moved for a day, or for one to go to or return from his office without assuming that others would not be guilty of negligence in their movements.

We review some of the cases relied upon by the petitioner to show that they are inapplicable to this case. In *Chicago etc. Ry. Co.* v. *Frese*, (263 U. S. 1) the engineer was required by a statute to not cross

another railroad, without first ascertaining it was clear. The failure to discharge such duty precluded a recovery.

The case of *Chesapeake etc. Ry. Co.* v. *Nixon*, 271 U. S. 218, merely holds that where no custom exists requiring the operatives of a train to keep a lookout for a motor car, and the rules require a motor car operator to keep a lookout for trains, the motor car operator cannot recover for an injury growing out of a collision.

This case is essentially different from those cases—in that the petitioner, apparently for the purpose of increasing the output, as well as raising the factor of safety in the thoroughness of the inspections that it could thereby obtain, elected to relieve the inspector's mind of the burden of keeping the possibilities of other trains approaching constantly in view, by requiring the bell to be rung as the trains passed along where the car inspectors were expected to be engaged in their work.

The nature of work required of the deceased suggested the importance of concentrating upon it. The jury had the right to conclude that if the bell had been rung Ferguson would not have been killed.

The other cases relied upon by the petitioner in support of its first proposition, are cases where the injury was brought about by the servant violating some rule of the company, or crossing cases which are so unlike the present case as to need no further comment than to point out the lack of similarity.

The fact that the deceased had for ten or twelve years discharged his duties, and avoided injury from all trains carefully operated—and it may be some carelessly operated, and that his boss for whom he had worked for two years found him safe, competent and careful—never a black mark or a complaint against him; and that when he was injured it was by a train being negligently operated, is of more than casual importance in passing upon the negligence of the petitioner and the contributory negligence of the deceased.

It is believed that it is quite universally established that negligence and contributory negligence are issues of fact for the determination of a jury, except in cases involving statutory regulations, and those cases in which the minds of reasonable men can not differ as to the conclusions that should be reached. The question of what should and what should not be submitted to the jury naturally brings us to the case of *Railway Company* v. *Stout*, 17 Wallace, 657.

This case has so long been recognized as the leading authority upon this question, and has been quoted so often that practically every lawyer in the land knows by heart the principles therein laid down. We quote, not to apprise this court of anything which may be termed elementary authority, but because we deem it as applicable to this case, and because it expresses the principles involved herein as well as they have been expressed, or ever can be expressed.

> **"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used,**

and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of the jury.

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus concurring than can a single judge."

We herein offer and commend to the court's attention some of the cases which recognize and follow the rule. We trust that, in thus presenting such a voluminous list of authorities, we are not unduly trespassing upon the court's time; but we feel that, though the question as to what should and what should not be left to the jury has been settled countless times, nevertheless it is incumbent upon us to produce authorities sustaining our viewpoint, and to present them, to the best of our ability, in such manner as least to inconvenience this court in reviewing them.

In the case of *Richmond & Danville Railroad Co.* v. *Powers*, 149 U. S. 43, the United States Supreme Court, speaking through Mr. Justice Brewer, says:

> "The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased was guilty of such contributory negligence as to prevent a recovery. **It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.**"

This case has been quoted many times, always with approval. We name one case, *McDermott* v. *Severe*, 202 U. S. 600, 50 L. Ed., 1162, in which the court says:

> "Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. **If fair-minded men, from the facts admitted, or conflicting testimony may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, and to be settled by the jury under proper instructions.**"

It is not essential to sustain a recovery in cases like this that there should be direct evidence by the mouth of eye witnesses to the occurrence. The manner in which the accident happened, as well as the absence of contributory negligence may be established by circumstances.

In *New York Central Ry. Co.* v. *Gapinski*, 161 C. C. A. 354, the plaintiff, Gapinski, was injured while bending over stuffing grease into the journal boxes of freight cars. His injury was claimed to be due to the

fact that he was struck by some projecting object upon a car which was "sent down upon the track on which or alongside of which he was working."

Gapinski testified that he did not know what hit him because when struck he was stooping or leaning over and working. "There was direct evidence that many of the cars" which were "sent down on said track were 'crippled,' *i. e.* cars 'with doors hanging out.'"

The testimony as to the crippled cars was denied, and the issue being submitted, Gapinski had a verdict.

The opinion of the court is as follows:

> "It is, we think, sufficient to dispose of this writ to refer to *Smith* v. *Pennsylvania R. R. Co.*, 239 Fed. 103, 151 C. C. A. 277. We there pointed out that, where there was no proof that any definitely indicated thing wrought the injury complained of nor 'that the circumstances rendering it possible for the injuring thing suggested **by plaintiff** to reach or touch, **plaintiff** existed at the time and place of damage, any verdict resting on such evidence, or lack of it, would be building one presumption upon another.
>
> "In that case, the suggested instrument of injury was the swinging rake hook of a passing locomotive. In this case, the suggested cause of plaintiff's hurt was a door hanging or projecting below the car body to which it belonged. But in the Smith case, **there was no evidence whatever** that any rake hook was projecting at the time, when and place where plaintiff was injured. In this case, there is direct evidence that not one, but several, if not many, cars having such unusual and dangerous projections were moving upon the track alongside of which plaintiff here was required to work.

> "**If the jury believe (as it did) this positive testimony of moving crippled cars, it was within their province to draw the inference that such proven projection did the hurt.** In the Smith case, there was no proven projection. We think the cases cited and the present one **considered together** perfectly illustrate the difference between a legitimate presumption from proven facts, and an attempted and unlawful presumption from another presumption."

In the case of *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. Ed. 984, the supreme court said, speaking through Mr. Justice Day (page 258):

> "Questions of negligence do not become questions of law, to be decided by the court, except '**where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.**' *Gardner* v. *Michigan Central R. Co.*, 150 U. S. 349, 361; 37 L. Ed. 1107, 1110."

We next offer the case of *Myers* v. *Pittsburg Coal Company*, 233 U. S. 184, 192, 193, 194; 58 L. Ed. 906, 911.

In that case, Myers was a brakeman on an underground mining train and had ridden a string of cars in on a switch. The electric motor car followed these cars in on this switch, where it ran upon something and was stopped. It was then discovered that Myers had been run over.

Near the point where Myer's body was found, the overhead trolley wire, which supplied the current to the electric motor car, passed over the tracks at a height of five feet seven and one-half inches from the rail, making it necessary for a man of ordinary height to remain seated in the car or stoop down. There was no light near this place.

The headlight on the motor car was defective and was not burning.

The case was submitted to a jury and a verdict was had by Myers' widow.

The verdict was reversed by the circuit court of appeals.

The supreme court reversing this holding after stating the facts, said, in part:

> "The opinion of the Circuit Court of Appeals placed the reversal largely upon **the want of definite proof as to the manner in which Myers came to his death—whether by contact with the wire, or if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and in the absence of some accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death.** * * *

> "Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation, he was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subjct. In our opinion, the trial court properly left the question to the jury upon the testimony which, when fairly considered, might sustain the verdict."

The negligence of petitioner was proved from the mouths of living witnesses. Petitioner was guilty of this negligence at the moment of Ferguson's death and just preceding it and at the exact place of his death. It was just the sort of negligence that a reasonable man would expect to result in the death or injury of some person or persons situated as Ferguson was.

Where circumstances must be relied upon to ascertain the precise cause of death, an inference must be drawn. We state frankly that we believe the jury would have been justified in finding against the respondent in this case. But we insist that as yet no court has held, so far as we can learn, that the proximate cause of death in cases of this character, can not

be proved by circumstances. A rule that "A," though guilty of the grossest sort of negligence, is not legally responsible for the negligent injury of "B" merely because "B" must rely upon circumstances to connect "A's" negligence with "B's" injury—such a rule is so repugnant to law and justice as almost to provoke derision. If a murderer can be hanged upon circumstantial evidence, it seems to us justice demands that the same sort of evidence be available to one who suffers injury at the hands of a negligent wrong-doer. That such is the law is shown by a review of the cases cited herein.

In the case of *Railway Company* v. *Howard*, 79 Ga. 44, the court said:

> "The question of what is ordinary care and what is negligence is exclusively for the jury, and the court in this charge takes this question from their consideration * * * The court cannot instruct the jury what a prudent man would do; for in legal contemplation, the jury knew it better than the court. If instructions on that subject had to be given, the jury would be the instructors and the court the instructed; that is, the jury would charge the judge on that part of the case, rather than receive a charge from him. It is not for the court to teach the jury the ways of the prudent man, but to warn them of the duty on the part of all others to make their ways like his. The court cannot point out to the jury specifically the ways of the prudent, the law supposing those ways better known to the jury than to the judge."

In Section 114, Shearman & Redfield on Negligence, 6th Ed. it is said:

> "Negligence is not absolute, but is a thing which is always relative to the particular cir-

cumstances ~~of~~ on which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a very general rule, it is a question for the jury—an inference to be deduced from the circumstances; it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which are upon conflicting evidence, and, if there be room for such difference, the question must be left to the jury" (Note, page 285).

It should always be remembered that a jury is made up of the average of the community—of the men who make up our people. These men are not the creatures of government and courts, but the government is their own creation and may be changed, modified or abolished entirely, if the people so desire. Whenever a government begins to usurp the powers and privileges of the people who created it, then it is on the way toward becoming a Frankenstein monster, and will ultimately destroy its creators or make their lives so miserable that they will turn and demolish the machine which is getting beyond the control of its masters.

However, we do not feel that there is any danger of this for a long time, if ever. The courts are practically unanimous in their recognition of the jury's right to try issues of fact; and so we believe that this court will hold, as it has always in the past that where

the testimony is conflicting, as it is in this case, the privilege of deciding upon these disputed facts will be left to the jury.

II.

The petitioner presents for its second proposition the contention that Ferguson was guilty of negligence which was the sole cause of his death.

COUNTER PROPOSITION.

The conduct of the master was the equivalent of a contract in which it agreed with the servant that he could depend upon the bell for warning.

The petitioner contends that the deceased should have heard the train though the bell was not rung, and that he not being entitled to a particular kind of sound announcing the approach of the train, should have avoided it.

We of course cannot anticipate to the extent of knowing what view this court will take of this contention; but it appears to us that if one will give fair consideration to the duties and responsibilities of a car inspector, he will readily reach the conclusion that common fairness—yea common honesty demands that this self imposed duty of ringing the bell to warn deceased, was the equivalent of a voluntary contract entered into by each, in which the master to insure a high standard and degree of efficiency in inspection as well as a maximum amount of work, agreed with the servant that he could depend upon the sharp sound of the bell to warn him of danger. The case is wholly unlike the crossing cases and cases where the servant

was violating rules of the master; the deceased was doing just what was to be expected of him. It would be unfair to let the master escape the burdens occasioned by a breach of its contract.

A detailed answer to this proposition would consist largely in a re-hash of what has been said in answer to petitioner's first proposition. Under this proposition the petitioner presents argument that inasmuch as the jury found that Ferguson was blinded by the glaring head light, that it contradicts the finding that the negligence in failing to ring the bell was the proximate cause of Ferguson's death. This argument ignores the well established doctrine that there may be more than one proximate cause of an injury, especially where those causes are not inconsistent.

We emphasize the statement that there is no inconsistency in the finding, by calling attention to the fact that the evidence was sufficient to have justified the jury in finding that Ferguson had been engrossed in his work between two cars, and not being advised of the approach of the train by the customary sharp ringing of the bell, stepped away from the standing cars, and met the glare of the headlight, which blinded him, and caused him to become confused, thereby causing him to stumble into a position of danger, or prevented him from appreciating the distance he was from the track, and the distance the approaching train was from him—in other words, that the failure to ring the bell, and the glare of the headlight operated as two proximate though joint causes of him being injured. If either constituted negligence, the petitioner is liable.

The authorities relied upon by the petitioner to sustain its theory of its being conjecture as to whether the failure to ring the bell was the cause of the injury, are not in point. It is quite self evident that when the master adopted the plan of ringing the bell to warn car inspectors of the approach of the train, that it foresaw the probability of the failure to ring the bell, causing injury to the inspectors. It appears to us that one would become ridiculous by arguing that it should not have anticipated some similar injury might result.

The petitioner argues that if deceased was blinded by the headlight, he knew of the approach of the train and cannot complain of the failure to ring the bell, as he assumed the risk of the bright headlight. We merely remark that the negligent failure to ring the bell being a proximate cause of the injury, it is immaterial that other conduct not culpable or negligent, participated in causing the injury. The glaring light is an explanation of why the failure to ring the bell caused the injury.

There was no finding that the deceased saw the headlight in time to have by the exercise of ordinary care on his part, avoided the injury—nor does the testimony show that he had such notice in time to have avoided the injury.

In this connection we call attention to the fact that the locomotive was being operated in violation of the National Safety Appliance Laws, and the applicable rules of the Interstate Commerce Commission in that the headlight on the locomotive that struck Ferguson

was not "diminished in the yard and at the station." The applicable rules of the Interstate Commerce Commission after requiring the use of certain designated headlights on road engines, provides in Section (c):

> "Such headlights shall be provided with a device whereby the lights from same may be diminished in yards and at stations, or when meeting trains" (R. 179).

Section 131 of the said rules of the Interstate Commerce Commission provides the character of lights that shall be used on engines engaged in switching service in the yards (R. 179).

The engineer testified (R. 123) that he had a bright headlight which was provided with a dimmer, but says:

> "I did not cut out my light or dim it in any way in going through the yards, I had a bright burning light."

The testimony was conclusive that the light was not dimmed.

It was shown (R. 85) that with a bright headlight such as described, that when the engine got within 200 feet of a person, if he looked toward it, it would blind him so that he would not know or could not see what he was doing. That it would prevent him from telling how far the train was from him.

> "If it was burning full bright, it blinds them, he just can't see."

There was quite a bit of uncontroverted testimony on this point conclusively establishing the well known

fact that an undimmed headlight when it gets reasonably near to one, has the effect of suddenly causing temporary blindness, and producing a state of confusion. This is common knowledge.

We submit that inasmuch as the petitioner was confessedly violating the Safety Appliance Laws, and that there was sufficient evidence to sustain the jury finding, that such operated as a proximate cause of Ferguson's death, that in any event, the judgment of the trial court should be sustained, because contributory negligence, if any, does not apply where the injury is caused in whole or in part by the violation of the safety appliance laws, or the applicable rules of the Interstate Commerce Commission thereby authorized (*Union Pac. Ry. Co.* v. *Huxoll*, 245 U. S. 535).

III.

Petitioner's third proposition contends that Ferguson met his death as the result of a risk assumed by him.

In support of that proposition, the petitioner presents some general statements of the law relative to assumed risk, but it is believed they are wholly inapplicable to this case. The jury found that Ferguson's death was caused by negligence of the petitioner in failing to comply with its self imposed duty of ringing the bell as the train passed through the yard.

There being no contention that Ferguson knew of the dangerous proximity of the train, in time to have avoided being injured by it, it is confidently believed

that the issue of assumed risk was not raised; but, if it was in fact raised, it was certainly an issue of fact to be determined by the jury, and having been so determined adversely to the petitioner, there is no merit in its contention.

We feel somewhat disposed to apologize for calling attention to the fact that it is the well established doctrine of this court, that one does not assume the risk of injuries resulting from negligence unless he knows of the particular negligence, and appreciates the danger to him, or the negligence is so open and obvious that in the discharge of his own duties he would have become apprised thereof, and appreciated the danger arising to him therefrom, in time to have by the exercise of ordinary care avoided the injury.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

IV AND V.

Under the above heading the petitioner contends that the supreme court erred in failing to reverse outright the judgment of the district court, and in reversing the judgment of the Court of Civil Appeals.

We pass without comment the suggestion of the petitioner that this court should deviate from its time honored rule, and in this case weigh the evidence to determine which litigant is favored with the preponderance thereof.

The contention of the petitioner that the finding of the jury that the proper signals were not given, and that the train headlight blinded the deceased are contradictory, is without merit, as there was no finding that the deceased was blinded by the headlight in time for him by the exercise of ordinary care on his part, to have avoided being injured by reason of the failure to ring the bell. Nor is there any merit in the contention of the petitioner that the evidence showed deceased was blinded by the headlight at such time as to excuse the master for having failed to give the proper warning.

The finding by the jury that the headlight blinded the deceased, was not a finding that the deceased knew of the approach of the train in time to have avoided being injured by it, nor was it a finding that the blinding headlight was the sole cause of the injury, so as to even raise the issue of the injury being caused by a risk assumed by the deceased.

VI.

Petitioner's sixth proposition contends that the Supreme Court of Texas failed to follow the rules of law established in the federal courts in construing the Federal Employer's Liability Act.

We do not find any warrant in the record for this charge made against the Supreme Court of Texas.

We very readily agree that the applicable decisions of the Supreme Court of the United States, control the rights of the parties to this suit insofar

as the points have been passed upon by the opinions of this court. However, we call attention to the fact that the rights of the parties have been ruled by the applicable decisions of the Supreme Court of the United States, and that we have relied upon those decisions for our contentions in this case.

We fail to find anything in the opinion of the Supreme Court of Texas, in this case, which suggests that its conclusion was reached by a rule not applicable under the decisions of the United States Supreme Court or other Federal Courts. The Supreme Court of Texas adopted the second opinion rendered by the Court of Civil Appeals of Texas, in which the judgment of the trial court was affirmed.

It is confidently believed that the conclusion reached by the Supreme Court of the State of Texas in this case, is fully supported by the applicable decisions of the Supreme Court of the United States.

We do not believe that this court is committed to the doctrine suggested by the petitioner, to the extent of making it applicable to cases like the one we are considering here. In this case every employee who testified, seems to have known that the railway company had voluntarily assumed the burden of ringing the bell on engines passing through the yards at Leesville, to warn car inspectors of the dangerous approach of the train. The character of the car inspector's work is such that it is apparent to any one that he would likely depend upon the sharp ringing of the bell to warn him of the dangerous approach of the train.

We repeat that we have relied, and still rely upon the opinions of this court to sustain our contention that the petitioner was guilty of negligence that proximately caused the injury, and that the deceased was not guilty of contributory negligence.

Sustaining our contention that the evidence was sufficient to support the jury finding that Ferguson had been working between the cars of the freight train that was being made up when the passenger train approached, and that he suddenly stepped from between those cars and came in position to be struck by the freight train, we have cited:

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.
Choctaw & G. Ry. Co. v. *McDade*, 191 U. S. 64.

To sustain our contention that contributory negligence was an issue of fact for the jury, we have relied upon:

Railway Company v. *Stout*, 17 Wallace, 657.
Richmond & Danville Railway Co. v. *Powers*, 149 U. S. 43.
McDermott v. *Severe*, 202 U. S. 600.
Kreigh v. *Westinghouse, etc., Co.*, 214 U. S. 249.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

Supporting our contention that the issue of assumed risk was correctly determined against the petitioner, we have cited:

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.

McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.

Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

We respectfully submit that this case was correctly disposed of by the Supreme Court of Texas, and we pray that the judgment of that court be in all things affirmed.

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